Dec'n 16. 78 Sab

8 Otto 410
Oct. T. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1,063.~~ 6574

BENJAMIN H. SCULL ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED MARCH 29, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 1,063.

BENJAMIN H. SCULL ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Citation	1	1
Petition	5	2
Map	9	8
Motion of A. E. Gracie et al to be made parties	11	10
Demurrer	13	11
Motion of J. M. Fisher to be made a party	17	13
Amended petition	19	14
Map	23	20
Demurrer to amended petition	24	21
Depositions on behalf of plaintiffs	28	23
Deposition of Creed Taylor	30	24
Second amended petition	38	28
Map	43	36
Maps	48	39
Copy of survey and grant	54	41
Motion of J. B. Valliere to be made party	57	44
Demurrer to second amended petition	59	45
Motion of W. K. Hall to be made party	63	47
Petition of Jno. Whitbeck to be made party	64	48
Stipulation	67	49
Orders making parties	68	50
Translation of final grant	76	54
Judgment	79	56
Petition of appeal	83	58
Bond	87	60
Clerk's certificate	89	60

1 THE UNITED STATES OF AMERICA.

To the United States of America:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to an order of appeal granted on the 4th day of February, 1878, by the District Court of the United States for the Western District of Missouri, wherein Benjamin H. Scull and others are appellants and the United States of America appellee, to show cause, if any there be, why the judgment rendered against the said appellants as in said order mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arnold Krekel, judge of the District Court of the United States for the Western District of Missouri, this fourth day of February, in the year of our Lord one thousand eight hundred and seventy-eight.

A. KREKEL, *Judge.*

2 UNITED STATES OF AMERICA, } *ss.*
WESTERN DISTRICT OF MISSOURI. }

I hereby acknowledge due service of the within citation this 16th day of February, A. D. 1878.

L. H. WATERS,
U. S. Dist. Atty.

3 UNITED STATES OF AMERICA, } *ss.*
WESTERN DISTRICT OF MISSOURI. }

In the District Court of the United States for the Western District of Missouri.

BENJAMIN H. SCULL, JOHN B. SCULL, LAFAYETTE SCULL, Francis Scull, William Scull, Louisiana Scull, Henry Scull, Zacharie Taylor, Creed Taylor, Margaret Taylor, Mary Ellen Tucker, Emma Tucker, Nettie Tucker, Wood Tucker, Annie Norris, Frank Vaugine, Philip Vaugine, heirs of Don Joseph Valliere, Caroline Banker, James Johnson, George W. Westbrook, Emily C. Day, A. W. Daby, Isabella Currie, adm'x of the estate of Bennett Currie, dec'd, Grace Currie, Sarah Currie, Harriet Currie, by their guardian, Isabella Currie, and William H. Duryea, Plaintiffs.

against

UNITED STATES, DEFENDANT.

Be it remembered that at chambers in the city of Jefferson, in said district, on the nineteenth day of May, A. D. 1875, the following entry appears of record in the above-entitled cause, to wit:

WEDNESDAY, *May 19th*, 1875. In vacation.

4 BENJAMIN H. SCULL, JOHN B. SCULL, LAFAYETTE Scull, Francis Scull, William Scull, Louisiana Scull, Henry Scull, Zacharie Taylor, Creed Taylor, Margaret Taylor, Mary Ellen Tucker, Emma Tucker, Nettie Tucker, Wood Tucker, Annie Norris, Frank Vaugine, Philip Vaugine, heirs of Don Joseph Valliere, Caroline Banker, James Johnson, George W. Westbrook, Emily C. Day, A. W. Daby, Isabella Currie, adm'x of the estate of Bennett Currie, dec'd, Grace Currie, Sarah Currie, Harriet Currie, by their guardian, Isabella Currie, and William H. Duryea, Plaintiffs,

against

UNITED STATES, DEFENDANT. } No. 1,115.

Plaintiffs, by William H. Duryea, their solicitor, file petition for decree of title to real estate.

And thereupon comes James S. Botsford, attorney of the United States for the Western District of Missouri, and acknowledges service of the said petition and waives service of any and all service.

And the petition so filed is in words and figures following, to wit:

District Court of the United States in and for the Western District of the State of Missouri.

BENJAMIN H. SCULL, JOHN B. SCULL, LA FAYETTE SCULL, Francis Scull, William Scull, Louisiana Scull, Henry Scull, Zacharie Taylor, Creed Taylor, Margaret Taylor, Mary Ellen Tucker, Emma Tucker, Nettie Tucker, Wood Tucker, Annie Norris, Frank Vaugine, Philip Vaugine, heirs of Don Joseph Valliere, Caroline Banker, James Johnson, George W. Westbrook, Emily C. Day, A. W. Daby, Isabella Currie, adm'x of the estate of Bennett Currie, dec'd, Grace Currie, Sarah Currie, Harriet Currie, by their guardian, Isabella Currie, and William H. Duryea, Plaintiffs,

against

UNITED STATES, DEFENDANT.

The petition of the above-named plaintiffs, in behalf of themselves, and all persons who have an interest in or claim to the lands described herein by William H. Duryea, their solicitor, respectfully shows to this honorable court, and under and in pursuance of an act of Congress of the United States, passed June 22, 1860, entitled "An act for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri, and for other purposes," and the act of Congress of the United States, passed June, 1872, reviving said act of 1860, alleges as follows:

I. That during the year A. D. 1793, and several years prior thereto and thereafter, the Province of Louisiana belonged to the government of Spain, and that during the time aforesaid said Province of Louisiana embraced a large tract of land or territory of which land or territory the States of Arkansas and Missouri are now a part.

II. That during the year A. D. 1793, Baron de Carondelet was governor-general of said Province of Louisiana, acting as such governor-general, under and for the King of Spain, with full power and authority in him vested by the King of Spain to grant and confirm titles to lands in said province to the subjects of said government of Spain, and to execute and deliver the grant or grants hereinafter mentioned.

III. That on or about the 11th day of June, 1793, the said Baron de Carondelet, as governor-general aforesaid, upon the petition of one Captain Don Joseph Valliere, a then resident of said province, made an order of survey of a tract of land situated upon the White river, and on each side thereof, within the said Province of Louisiana, and within what is now the States of Arkansas and Missouri, in favor of said Valliere, and upon his petition, and duly delivered the same to Don Carlos de Trudeau, at that time the royal and private surveyor of the said province of Louisiana, for the purpose of having said lands surveyed for the benefit of said Valliere; that said order of survey is in the words and figures, and in substance and purport following, to wit:

"11th June, 1793, to Captain Don Joseph Valliere, in the District of Arkansas, a tract of land, situated on the White river, extending from the rivers Norte Grande and Cibolos to the source of the said White river, ten leagues in depth.

"BARON DE CARONDELET."

6 That said order of survey is recorded in the land office at New Orleans, State of Louisiana, in Book No. 4, entitled "Register de los Primeros Decretos de Concession de tierra," in volume 6 thereof, page 31, which register and record forms a part of the archives of that office.

IV. That on or about the 18th day of June, 1793, the said Don Carlos Trudeau, surveyor-general aforesaid, in pursuance of said order of survey, surveyed and made a plat or survey of said tract of land in said order mentioned, and duly signed, sealed and delivered the same on about the 24th day of October, 1793, and that said survey is in the words and figures, and in substance and purport following, to wit:

Don Carlos Trudeau, royal and private surveyor of the Province of Louisiana. "I certify having measured in favor and in presence of Don Joseph Valliere, captain of the stationary regiment of Louisiana, a portion of land situated in the jurisdiction of Arkansas, on the north and south banks of Rio Blanco, Rio Cibolos, on the west or superior limit by the fountain-head or origin of the most western

branch of the said Rio Blanco, and by vacant lands of his majesty, separated from said vacant lands by a line beginning at the said fountain-head of the northwestern branch of Rio Blanco, running southwest ten leagues in depth on the north by the lands of his majesty, separated from these by a drawn line beginning at the Rio Norte Grande, commencing at a point distant ten leagues in a direct line from its mouth or confluence with the Rio Blanco, running in a course nearly west until it meets the fountain-head or origin of the most western branch of the Rio Blanco, and on the south side by vacant lands of his majesty, separated from these by a line drawn apart, beginning at a point where ends the southwest limit, ten leagues from the fountain-head or origin of the most western branch of the Rio Blanco, running on a parallel line with the said Rio Blanco, descending ten leagues in depth, until it meets Rio Cibolos, at a distance of ten leagues in a direct line from Rio Blanco. All of which is now fully demonstrated in the figurative plan which precedes, in which is artificial or natural boundaries. The line and limits have been made at the request of the grantee, and in compliance with the order from the governor-general, Baron de Carondelet, 18th June, present year. I certify to all which precedes in order that it may be verified.

"I delivered the present, with the figurative plan, 24th October, 1793.

(Signed) CHARLES TRUDEAN,
Surveyor-General."

That said survey, together with a map or plat thereof, is recorded and filed in the surveyor-general's office of State of Louisiana, at New Orleans, in Bundle Letter "N" No. 37, and is a part of the record and archives of that office.

V. That on or about the 22d day of December, 1793, the foregoing survey having been made and returned in pursuance of the order or grant aforesaid, the said governor-general of the Province of Louisiana, by the power and authority in him vested, executed and delivered to the said Captain Don Joseph Valliere, a grant of the lands described in the said survey and map, or plat thereto annexed, by an instrument in writing dated December 22, 1793, which grant is in words and figures, and in substance and purport following, to wit:

DON FRANCISCO, Baron De Carondelet, &c., &c.

For the benefit of the public, and for the greater encouragement of agriculture and industry of the country, I have judged it expedient to take steps for surveying and granting the royal lands to province.

Therefore, I grant to Don Joseph Valliere, captain of the regiment stationed in Louisiana, a portion of land in the jurisdiction of Arkansas, situated on both banks of the Rio Blanco, ten leagues on both banks, beginning at the origin of the most western branch of

the Rio Blanco, and running southwest ten leagues, descending from thence on the south by parallel line with the Rio Blanco at the distance of ten leagues until it intersects Rio Cibolos at a point ten leagues in a direct line with Rio Blanco. From thence descending Rio Cibolos to its confluence with Rio Blanco. Following this as far as the mouth of Rio Norte Grande, up the same to a point ten leagues in a direct line from its mouth. From thence ascending Rio Blanco to the north in a westerly direction ten leagues from the same, as far as its source, which will be better seen on the figurative plan made by my order by the surveyor-general, Don Carlos Trudeau, of this province, 24th of October last (it being impossible for the royal surveyor to make an actual survey at this time,)
7 and in virtue of my order in June of the current year, by which I made him a grant and ordered the surveyor-general to put him in possession according to the usual form. In consequence of the power which has been conferred on me by our lord the King (God preserve), I grant in his royal name to the said Don Joseph Valliere, captain of the regiment of infantry of Louisiana, the said portion described above, in order that he may dispose of it, he and his legitimate successors, as property belonging to him.

Done in New Orleans, 22d December, 1793.

EL BARON DE CARONDELET."

That said grant is recorded in the office of the general custodian of the archives of the Royal Treasury for the Island of Cuba, in the Book of Grants of the king's lands in Florida and other provinces, at folio thirty-three thereof.

VI. That by the execution and delivery of the grant last aforesaid, and the preliminary grant or order of survey, and the survey itself, the said Captain Don Joseph Valliere became absolutely vested with the title of the lands described therein, by competent authority, prior to the cession to the United States of the territory in which said lands were included, and such title was created and perfected in said Valliere during the period while the government of Spain, from which it emanated, claimed sovereignty over, or had the actual possession of, such territory; and said lands, in said grant described thereby, became separated from the public domain of the said government of Spain, and became the private property of said Captain Don Joseph Valliere for him to hold to himself, his heirs, and assigns forever.

VII. Your petitioners further allege that the said Captain Don Joseph Valliere died intestate, in the city of New Orleans, State of Louisiana, in or about the year 1799, and died seized of all the said lands and premises.

VIII. That on or about the 23d day of June, 1841, Achillis Godin, James Brooks and Matilda Brooks, James Scull and Manette Scull, John Dodge, Ellienette Dodge, Francis W. Vaugine, Odiel Vaugine, Creed Taylor, Paul Vaugine, Harriet Vaugine, Francis

Valliere, Juley Valliere, at that time the only surviving heirs of the said Don Joseph Valliere, and then being the owners in fee of the said lands described in this petition by inheritance, duly executed and delivered under their hands and seals to one John Wilson, of the State of Missouri, a deed bearing date on that day whereby they sold and conveyed to said John Wilson one undivided half of all the lands hereinbefore mentioned and described, which deed was duly recorded in the county of ———.

IX. That a portion of the lands described in said grant are situated, lying, and being in the counties of Ozark, Douglas, Taney, Christian, Stone, and Barry, of the State of Missouri, and are within the jurisdiction of this court.

X. That your petitioners are informed that there are other persons who claim to have some interest in the said lands, and that their names are at present unknown to your petitioners, and your petitioners pray that their names, when ascertained, may, upon the trial of this cause, be inserted in this petition, and the proceedings herein.

XI. That your petitioners are the surviving heirs of said Don Joseph Valliere, and grantees of the heirs of said Valliere and of said Wilson, and as such are the true and lawful owners in fee of said lands, and have a just and equitable claim thereto, their interest in said lands being undivided, and as tenants in common. And your petitioners pray that upon the trial of this cause they may be allowed to prove and establish their respective and individual rights, title, or interest in and to the said lands by proper evidence and proof, documentary or otherwise.

XII. That copies of the said order of survey mark "A," survey and plat marked "B," and final grant mark "C," are hereto annexed and made part of this petition.

XIII. Your petitioners further allege that by the provisions in treaty of cession from France to the United States, dated the 30th day of April, 1803, the said grant to said Captain Don Joseph Valliere, was fully protected and secured to him, likewise by the laws of nations.

Your petitioners, therefore, respectfully pray, that in accordance with said act of Congress, and the provisions therein contained, a copy of this petition be served upon the district attorney for this district and of this court, and that he be required to appear for the United
8 States, and answer thereto, and that the claim or claims of your petitioners may be adjudged good and valid in all respects as against the United States; that said order of survey, survey and plat, and final grant, may be adjudged and decreed by this court good, valid, complete, and genuine title and evidence of title to said lands, in said Captain Don Joseph Valliere, and that said lands be adjudged and decreed to be the lands of and belonging to your petitioners, and that it be decreed by this court that they, and each of them, be entitled, as provided in said act of Congress, to patents or

warrants to be issued by the United States, for the lands described herein, and for their respective and individual rights, title, and interests therein, as may be adjudged and decreed by this court, and if said lands, or any part thereof, have been disposed of by the United States, then it be decreed by this honorable court that the defendants issue warrants or patents to the petitioners of the public domain, an amount equal to the amount of said land, so disposed of, and for such other order, judgment, and decree, or relief, as to this court may seem just, proper, and equitable, and your petitioners will ever pray.

WM. H. DURYEA,
Solicitor for Petitioners,
22 *La Fayette avenue, Brooklyn, N. Y.*

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

James Johnson, being duly sworn, says he is one of the petitioners and plaintiffs named in the foregoing petition; that he has read the same and knows the contents thereof, and that said petition is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, he believes the same to be true.

JAMES JOHNSON.

Subscribed and sworn to before me, at New York city, this 8th day of May, 1875, as witness my hand and official seal.

CHARLES NETTLETON, [SEAL.]
Commissioner for Missouri in New York,
117 *Broadway, N. Y. City.*

CITY AND COUNTY OF NEW YORK, *ss:*

William H. Duryea, being duly sworn, says he is one of the petitioners and plaintiffs named in the foregoing petition; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, he believes the same to be true.

W. H. DURYEA.

Subscribed and sworn to before me, at New York city, this 10th day of May, 1875, as witness my hand and official seal.

[SEAL.] HENRY C. BANKS,
Com. for Missouri, 3 John st., N. Y. City.

9 EXHIBIT "A."

Al Capitan D'n Joseph Valliere en el Distrito de Arkansas, una porcion de tierra situada sobre el Rio Blanco, y extendiendo desde los Rio Norte grande, y cibolos, hasta el origen de dicho Rio Blanco, diez leguas en profundidad.

BARON DE CARONDELET.

EXHIBIT "B."

Don Carlos Trudean, agrimensor R'l y Particular de la provincia de la Luisiana.

Certifico, que ha sido medido, y lindado, a favor y en presencia, de Don Joseph Valliere, Capitan del Regimento fixo de la Luisiana una porcion de tierra situada en la Juridicion de Arkansas, sobre los margenes, Norte y Sur del Rio Blanco, lindado acia el Este, ó por el limite inferior Con el Rio Norte grande el Rio Blanco, y el Rio Cibolos, al Œsteó limite superior Con el frente, ó origen del Brazo mas occidental de dicho Rio Blanco, y Con tierras vacantes del Domino de S. M'd. Separado, del esta ultimas por una linea tirada desde el Dicho fuente, ó, Origen del Brazo mas occidental del Rio Blancho, Con un Curso Sur Œste de diez leguas en profondida, por la parte el Norte, Con tierras del Domino de S. M'd Separada de esta por una linea tirada desde el Rio Norte grande, Comensando —a un puñta, distanta Diez leguas, en linea directa de Su embocadura, en el Rio Blanco, y Coriendo un Curso Casia Œste, Hasta de que Con el fuente ó origen del Brazo mas Œste del Rio Blanco, y por la—parte del Sur, Con tierras vacantes y del Domino de S. M'd. Separada de estas por una linea tirada, Separada, desde el punto endonde acaba el limite Sur Œste, diez leguas del fuente, ó origen del Brazo mas occidental del Rio Blanco, y Corriendo Sobre una linea paralela Con el Rio Blanco, Decendiendo Diez leguas en Su profondidad, Hasta que de Con el Cio Cibolo, a la dicha distancia de diez leguas en linea Recta desde el rio Blanco, el todo esta mas empliamente demustrado en el plano figurativo que antecede, en el qual estan Señaladas las dimenciones y Curso de los limites las arboles y mojones, Sirviendo de linderas artificiales y Naturales, las lineas y limites—Han Sid o Hecha a solicitad del Interresado y en Complimiento del decreto del Señor gov'r gra'l el Baron de Carondelet, de diez—de junio, del Corriente ano, de todo lo que doy fe y para que Sirve donde Convenga Doy la presente Con el plano figurativo que entecede a viente y quatro, de octubre de mil Setecientos noventa y tres años.

(Signed) CARLOS TRUDEAN, *Ag'e G'l.*

[Here follows map, marked page 9.]

EXHIBIT "C."

A. f. 39 del libro Real enque Constan Estractados los titulos espedidos, por los Goveranadores Intendentes, de la Florida occidental respectivos el año de 1793 Se halla uno que dice así.

Don Francisco, Baron de Carondelet, &c., &c., &c.

Por Cuanto, en beneficio del publico y para el mayor fomento de la agriculture é industria del Pais, he juzgado á proposito tomar varias disposiciones para apear y Conceder los terrenos Realengos de esta Villa. Pc: tanta, Concedo a Don Joseph Valliere, Capitan del Regimento fixo de la Luisiana, una suerte de tierra en la juris-

dicion de Arkansas. Situada en ambas orillas del Rio Blanco, diez leguas sobre ambas orillas de dicho Rio principiando desde dicho nacimiento del brazo mas occidental del Citado Rio Blanco, y Corriendo Sud Œste diez leguas, bajando de alli, al sud de dicho Rio Blanco, en linea paralela Con dicho Rio Blanco, á la distancia de diez leguas hasta atravesar el Rio Cibolos, á un punto distante diez leguas linea recta Con dicho Rio Blanco, de alli, bajando dicho Rio Cibolos hasta su desagüe al Rio Blanco, siguiendo este hasta la embocadura de Rio Norte Grande, entrando al norte de alli, arriba de dicho Rio Norte Grande diez leguas en linea recta de su embocadura desde alli, subiendo dicho Rio Blanco, al norte del mismo en direccion occidental á la distancia de diez leguas del mismo hasta principio, el Cual se vera mesur Con el plano figurativo formado de mijorden, por al agrimensor Real Don Carlos Trudean de la Provincia en 24 de octubre ultimo, (hallandose el impossibilitado en la actualidad de levantar un plano y en virtud de mi decreto, de junio, del corriente año por el Cual le hice merced y dispuse se le pusiera en posecion en la forma acostumbrada, usando desde luego de la facultad que Rey el nuestro, Señor (Q. D. G.) me tiene conferida, octorgo en su Real nombre al dicho Don Joseph Valliere, Capitan del Regimento de Infanteria, de la Luisiana, la referida suerte de tierra Como Va mas arriba dicho y esplicado para que Como suya propia, disponga libremente de ella y la usufrute asi él Como los que legitimente le succedieren.

Dado en Nueva Orleans á 22de Diciembre de 1793.

Fermado, EL BARON DE CARONDELET.

11 de JUNIO, 1793.

10 And on said petitition the acknowledgment of service on the district attorney is endorsed, which said endorsement is in words and figures following, to wit:

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF MISSOURI. } *ss.*

I, James S. Botsford, att'y of the United States of America for the Western District of Missouri, do acknowledge service of the within petition and waive the service of any and all process, and agree to enter the appearance of the United States as defendant therein on the first day of the next September term of the District Court of the United States for the Western District of Missouri.

Witness my hand, at the city of Jefferson, in said district, the 19th day of May, 1875.

JAS. S. BOTSFORD,
U. S. Attorney.

And afterward, at the regular stated March term of said court, begun and holden at the city of Jefferson, in said district, on the first Monday, the first day of March, A. D. 1875, and on Monday,

the seventh day of June, 1875, an adjourned term thereof, the following further entry appears of record in said cause, to wit:

BENJAMIN H. SCULL ET AL., HEIRS OF DON JOSEPH Valliere; Wm. H. Duryea et al., grantees
11 of the heirs of Valliere, and John Wilson, Plaintiffs,
against
THE UNITED STATES, DEFENDANT.

On this day came Annie E. Gracie and Eulalie V. Walker, John T. Doyle, D. P. Barnard, and George W. Parsons, by Warwick Tunstall, their solicitor, and file motion that they be joined with complainants herein as plaintiffs in this case and allowed to set up and maintain their rights and interests in the land set forth and described in the petition in this case.

Whereupon, on consideration of said motion by the court, it is ordered that the said Annie E. Gracie, Eulalie V. Walker, John T. Doyle, D. P. Barnard, and George W. Parsons be and they are made co-plaintiffs in this action, and as such allowed to set up and maintain their rights and interests in the land set forth and described in the petition in this case.

And said motion so filed is in words and figures following, to wit:

District Court of the United States in and for the Western District of the State of Missouri.

BENJAMIN H. SCULL ET AL.
vs.
UNITED STATES. } No. 1,115.

In this case come Annie E. Gracie and Eulalie V. Walker,
12 persons sole and residents of the county of Jefferson and State of Arkansas, and John T. Doyle, of San Francisco, State of California, and D. P. Barnard and George W. Parsons, of the city of Brooklyn and State of New York, and move the court that they be joined with complainants herein as plaintiffs in this case and allowed to set up and maintain their rights and interests in the lands set forth and described in the petition in this case, for the following reasons:

1st. The said Annie E. Gracie and Eulalie V. Walker are the daughters and sole heirs of Eulalie Vaughine, dec'd, (wife of Creed Taylor and daughter of Felicita Valliere, a daughter of Don Joseph Valliere, the grantee of the land, as set forth in the petition aforesaid, and as heirs of said Joseph Valliere they are tenants in common with the plaintiffs in the land described and claimed in the petition in this case.

2d. The said John T. Doyle, D. P. Bernard, and George W. Parsons are the true and lawful owners of certain undivided interests in the land claimed in pltffs.' petition, derived from the heirs

of the said Joseph Valliere, through deeds to John Wilson, mentioned in said petition, and other mesne conveyances transmitting title to these claimants.

WARRICK TUNSTALL,
For foregoing claimants.

And afterwards, at a regular stated term of said court, begun and holden at the city of Jefferson, district aforesaid, on the first
13 Monday, the sixth day of September, A. D. 1875, the following further entry appears of record in the above-entitled cause, on Monday, the 6th day of September, 1875, to wit:

BENJAMIN H. SCULL ET AL., PLAINTIFFS,
vs.
THE UNITED STATES, DEFENDANT. } No. 1,115. Petition.

On this day comes the district attorney on behalf of the United States and enters the appearance of the defendant, and also come the original plaintiffs by their attorneys, Duryea & Ewing, whereupon the district attorney files a demurrer to the petition of the plaintiffs herein.

And the demurrer so filed is in words and figures following, to wit:

In the U. S. District Court for the Western District of Missouri, at the September term, 1875.

BENJAMIN H. SCULL ET AL., PL'T'FFS,
against
THE UNITED STATES, DE'F'D.

And now at this day comes the said defendant, by her attorney for said district, and demurs to the petition of the plaintiffs in the above-entitled cause, and for causes of demurrer assigns the following grounds:

First. Said petition does not state sufficient facts under the acts of Congress referred to therein to warrant the relief
14 sought.

Second. Said plaintiffs have not filed with their said petition their evidence in support of their claim, including the originals of the alleged order of survey, survey and figurative plan and grant, copied in said petition, and of the alleged petition of said Captain Don Joseph Valliere to said Baron de Carondelet, on which said alleged order of survey was made.

Third. Said petition is not accompanied with a sworn statement by the claimants of the lands supposed to be covered by their claim, according to the legal divisions and subdivisions of the surveys made by the United States.

Fourth. Said petition does not show that the tract of land claimed by plaintiffs was ever separated from the mass of the public domain by actual survey.

Fifth. Said petition does not show that the land claimed by plaintiffs was ever separated from the mass of the public domain by definition of fixed natural and ascertainable boundaries or initial points, courses, and distances by the competent authority prior to the cession to the United States of the territory in which the lands claimed were included.

Sixth. Said petition does not show that the said lands are claimed by complete grant or concession, or order of survey duly executed.

Seventh. Said petition does not state sufficient facts to show that the land claimed was ever separated from the mass of the
15 public domain.

Eighth. The said grant of the said Baron de Carondelet to said Captain Don Joseph Valliere, dated December 22, 1793, is void on account of the uncertainty and vagueness of the description contained therein.

Ninth. Said petition does not show that said Captain Don Joseph Valliere, or any person claiming under him, was placed in possession of the land claimed by the authorities of the government by whom said order of survey and grant were made.

Tenth. Said petition does not show that the lands claimed have been in possession of and cultivated by the original claimant, or those holding title under him, for a period less than twenty years.

Eleventh. Said petition does not show that the claimants, and those from whom they derive title, have held continuous possession of the land claimed, from the date of the cession to the United States of the territory out of which the States of Florida, Louisiana, and Missouri were formed.

Twelfth. Said petition states facts which show that the said grant has long since been abandoned.

Thirteenth. By virtue of the law of the land and of the provisions of the several acts of Congress applicable to the case, plaintiffs are not entitled to any relief in the premises.

Wherefore, and for divers other good causes of demurrer appearing in the said petition, the defendant doth demur
16 thereto, and humbly demands judgment of this court, whether she shall be compelled to make any further or other answer to the said petition, and prays to be hence dismissed with her costs and charges in this behalf most wrongfully sustained.

JAMES S. BOTSFORD,
U. S. Attorney and Counsel for Defendant.

I certify that in my opinion the foregoing demurrer is well founded in point of law, and that it is not interposed for delay.

JAMES S. BOTSFORD,
Counsel for Defendant.

And afterward, at the regular stated September term, A. D. 1875, of said court, and on Monday, the eleventh day of October, an ad-

journed day thereof, the following further entry appears of record in this cause, to wit:

BENJAMIN H. SCULL ET AL., HEIRS OF DON JOSEPH VALLIERE; Wm. H. Duryea et al., grantees of the heirs of Valliere, and John Wilson, Plaintiffs,
against
THE UNITED STATES, DEFENDANT. } No. 1,115.

On this day comes Joseph M. Fisher, by his attorneys, E. L. Edwards & Son, and file an application to be made a party plaintiff herein.

17 And the said application so filed is in words and figures following, to wit:

In the District Court of the United States, Western District of Missouri, September term, 1875.

BENJAMIN H. SCULL ET AL.
vs.
THE UNITED STATES.

Now, at this day, comes Joseph M. Fisher, of the county of Dunklin in the State of Missouri, and moves the court to permit him to join with the complainants in this cause, and that he be allowed to set up and maintain his right and interest in the lands set forth and described in the plaintiffs' petition, for the following reasons:

1st. Because he, the said Joseph M. Fisher, is the true and lawful owner of a certain interest in said land claimed in plaintiffs' petition derived from the heirs of said Valiere through deed to John Wilson, mentioned in said petition, and other mesne conveyances transmitting title to plaintiff to a part of said lands.

JOSEPH M. FISHER,
By E. L. EDWARDS & SON,
His Attorneys.

And afterward, at the said regular stated September term, A. D. 1875, of said court, and on Tuesday, the 26th day of October,

18 1875, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJAMIN H. SCULL ET AL., HEIRS OF DON JOSEPH VALLIERE; Wm. H. Duryea et al., grantees of the heirs of Valliere, and John Wilson, Plaintiffs,
against
THE UNITED STATES, DEFENDANT. } No. 1,115.

On this day come the plaintiffs, by H. C. Ewing, of counsel, and also comes the district attorney, on behalf of the United States, when, with leave of court, the plaintiffs file an amended petition herein, and

thereupon the defendant has leave to plead to plaintiffs' amended petition on or before the 9th day of November, 1875.

And the amended petition so filed is in words and figures following, to wit:

19 District Court of the United States in and for the Western District of the State of Missouri.

BENJAMIN H. SCULL, JOHN B. SCULL, LA FAYETTE SCULL, Francis Scull, William Scull, Louisiana Scull, Henry Scull, Zacharie Taylor, Creed Taylor, Margaret Taylor, Mary Ellen Tucker, Emma Tucker, Nettie Tucker, Wood Tucker, Annie Norris, Frank Vaugine, Philip Vaugine, heirs of Don Joseph Valliere, Caroline Banker, James Johnson, George W. Westbrook, Emily C. Day, A. W. Daby, Isabella Currie, adm'x of the estate of Bennett Currie, deceased; Grace Currie, Sarah Currie, Harriet Currie, by their guardian; Isabella Currie, and William H. Duryea, Plaintiffs,

against

UNITED STATES, DEFENDANT.

The amended petition of the above-named plaintiffs, in behalf of themselves, and all persons who have an interest in or claim to the lands described herein, by William H. Duryea, their solicitor, respectfully shows to this honorable court, and under and in pursuance of an act of Congress of the United States, passed June 22, 1860, entitled "An act for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri, and for other purposes," and the act of Congress of the United States, passed June, 1872, reviving said act of 1860, alleges as follows:

I. That during the year A. D. 1793, and several years prior thereto and thereafter, the Province of Louisiana belonged to the government of Spain, and that during the time aforesaid said Province of Louisiana embraced a large tract of land or territory, of which land or territory the States of Arkansas and Missouri are now a part.

II. That during the year A. D. 1793, Baron de Carondelet was governor-general of said Province of Louisiana, acting as such governor-general under and for the King of Spain, with full power and authority in him vested by the King of Spain to grant and confirm titles to lands in said province to the subjects of said government of Spain, and to execute and deliver the grant or grants hereinafter mentioned.

III. That on or about the 11th day of June, 1793, the said Baron de Carondelet, as governor-general aforesaid, upon the petition of one Captain Don Joseph Valliere, a then resident of said province, made an order of survey of a tract of land situated upon the White river, and on each side thereof, within the said Province of Louisi-

ana, and within what is now the States of Arkansas and Missouri, in favor of said Valliere, and upon his petition, and duly delivered the same to Don Carlos de Trudeau, at that time the royal and private surveyor of the said Province of Louisiana, for the purpose of having said lands surveyed for the benefit of said Valliere; that said order of survey is in the words and figures, and in substance and purport following, to wit:

"11th June, 1793, to Captain Don Joseph Valliere, in the district of Arkansas, a tract of land situated on the White river, extending from the rivers Norte Grande and Cibolos to the source of the said White river, ten leagues in depth.

"BARON DE CARONDELET."

That said order of survey is recorded in the land office at New Orleans, State of Louisiana, in Book No. 4, entitled "Register de los Primeros Decretos de Concession de tierra," in volume 6 thereof, page 31, which register and record forms a part of the archives of that office.

IV. That on or about the 18th day of June, 1793, the said Don Carlos Trudeau, surveyor-general aforesaid, in pursuance of said order of survey, surveyed and made a plat or survey of said tract of land in said order mentioned, and duly signed, sealed, and delivered the same on about the 24th day of October, 1793, and that said survey is in the words and figures, and in substance and purport following, to wit:

Don Carlos Trudeau, royal and private surveyor of the Province of Louisiana. "I certify having measured in favor and in presence of Don Joseph Valliere, captain of the stationary regiment of Louisiana, a portion of land situated in the jurisdiction of Arkansas, on the north and south banks of Rio Blanco, Rio Cibolos, on the west or superior limit by the fountain-head or origin of the most western branch of the said Rio Blanco, and by vacant lands of his majesty, separated from said vacant lands by a line beginning at the said fountain-head of the northwestern branch of Rio Blanco, running southwest ten leagues in depth; on the north by the lands of his majesty, separated from these by a drawn line beginning at the Rio Norte Grande, commencing at a point distant ten leagues in a direct line from its mouth or confluence with the Rio Blanco, running in a course nearly west until it meets the fountain-head or origin of the most western branch of the Rio Blanco; and on the south side by vacant lands of his majesty, separated from these by a line drawn apart, beginning at a point where ends the southwest limit, ten leagues from the fountain-head or origin of the most western branch of the Rio Blanco, running on a parallel line with the said Rio Blanco, descending ten leagues in depth, until it meets Rio Cibolos, at a distance of ten leagues in a direct line from Rio Blanco. All of which is now fully demonstrated in the figurative plan which precedes, in which is artificial or natural boundaries.

The line and limits have been made at the request of the grantee, and in compliance with the order from the governor-general, Baron de Carondelet, 18th June, present year. I certify to all which precedes in order that it may be verified.

"I delivered the present, with the figurative plan, 24th October, 1793.

(Signed) CHARLES TRUDEAU,
Surveyor-General."

That said survey, together with a map or plat thereof, is recorded and filed in the surveyor-general's office of Louisiana, at New Orleans, in Bundle Letter "N" No. 37, and is a part of the record and archives of that office.

V. That on or about the 22nd day of December, 1793, the foregoing survey having been made and returned in pursuance of the order or grant aforesaid, the said governor-general of the Province of Louisiana, by the power and authority in him vested, executed and delivered to the said Captain Don Joseph Valliere, a grant of the lands described in the said survey and map, or plat thereto annexed, by an instrument in writing, dated December 22, 1793, which grant is in words and figures, and in substance and purport following, to wit:

DON FRANCISCO, Baron de Carondelet, &c., &c.

For the benefit of the public, and for the greater encouragement of agriculture and industry of the country, I have judged it expedient to take steps for surveying and granting the royal lands to province.

Therefore, I grant to Don Joseph Valliere, captain of the regiment stationed in Louisiana, a portion of land in the jurisdiction of Arkansas, situated on both banks of the Rio Blanco, ten leagues on both banks, beginning at the origin of the most western branch of the Rio Blanco, and running southwest ten leagues, descending from thence on the south by parallel line with the Rio Blanco at the distance of ten leagues, until it intersects Rio Cibolos at a point ten leagues in a direct line with Rio Blanco. From thence descending Rio Cibolos to its confluence with Rio Blanco. Following this as far as the mouth of Rio Norte Grande, up the same to a point ten leagues in a direct line from its mouth. From thence ascending Rio Blanco to the north in a westerly direction ten leagues from the same, as far as its source, which will be better seen on the figurative plan made by my order by the surveyor-general, Don Carlos Trudeau, of this province, 24th of October last (it being impossible for the royal surveyor to make an actual survey at
21 this time), and in virtue of my order in June of the current year, by which I made him a grant and ordered the surveyor-general to put him in possession according to the usual form. In consequence of the power which has been conferred on me by our lord the king (God preserve), I grant in his royal name to the

said Don Joseph Valliere, captain of the regiment of infantry of Louisiana, the said portion described above, in order that he may dispose of it, he and his legitimate successors, as property belonging to him.

Done in New Orleans, 22d December, 1793.

EL BARON DE CARONDELET."

That said grant is recorded in the office of the general custodian of the archives of the Royal Treasury for the Island of Cuba, at Havana, in the Book of Grants of the king's lands in Florida and other provinces, at folio thirty-nine thereof.

VI. That by the execution and delivery of the grant last aforesaid, and the preliminary grant or order of survey, and the survey itself, the said Captain Don Joseph Valliere became absolutely vested with the title of the lands described therein, by competent authority, prior to the cession to the United States of the territory in which said lands were included, and such title was created and perfected in said Valliere during the period while the government of Spain, from which it emanated, claimed sovereignty over, or had the actual possession of, such territory; and said lands, in said grant described thereby, became separated from the public domain of the said government of Spain, and became the private property of said Captain Don Joseph Valliere for him to hold to himself, his heirs, and assigns forever.

VII. Your petitioners further allege that the said Captain Don Joseph Valliere died intestate, in the city of New Orleans, State of Louisiana, in or about the year 1799, and died seized of all the said lands and premises.

VIII. That on or about the 23d day of June 1841, Achillis Godin, James Brooks and Matilda Brooks, James Scull and Manette Scull, John Dodge, Ellienette Dodge, Francis W. Vaugine, Odiel Vaugine, Creed Taylor, Paul Vaugine, Harriet Vaugine, Francis Valliere, Juley Valliere, at that time the only surviving heirs of the said Don Joseph Valliere, and then being the owners in fee of the said lands described in this petition by inheritance, duly executed and delivered under their hands and seals, to one John Wilson, of the State of Missouri, a deed bearing date on that day whereby they sold and conveyed to said John Wilson, one undivided half of all the lands hereinbefore mentioned and described, which deed was duly recorded in the county of ———.

IX. That a portion of the lands described in said grant are situated, lying, and being in the counties of Ozark, Douglas, Taney, Christian, Stone, and Barry, of the State of Missouri, and are within the jurisdiction of this court.

X. That your petitioners are informed that there are other persons who claim to have some interest in the said lands, and that their names are at present unknown to your petitioners, and your petitioners pray that their names, when ascertained, may, upon the

trial of this cause, be inserted in this petition, and the proceedings herein.

XI. That your petitioners are the lawful descendants and surviving heirs of said Don Joseph Valliere, and grantees of the heirs of said Valliere and of said Wilson, and as such are the true and lawful owners in fee of said lands, and have a just and equitable claim thereto, their interest in said lands being undivided, and as tenants in common.

XII. That copies of the said order of survey marked "A," survey and plat marked "B," grand final grant marked "C," are hereto annexed and made part of this petition.

XIII. Your petitioners further allege that Rio Blanco, as herein alleged in paragraphs III., IV., and V., and set forth in exhibits "A," "B," and "C," is the White river of the State of Arkansas, having its source in the most westerly part thereof, running through the southwesterly portion of the State of Missouri, and thence through the said State of Arkansas, and emptying into the Mississippi river, that Rio Cibolos as herein alleged in said paragraphs, and set forth in exhibits "A," "B," ond "C," is the Buffalo river, a branch of the said White river, that Rio Norte Grande as herein alleged in said paragraphs and set forth in exhibits "A," "B," and "C," is the Great North Fork River of the State of Arkansas, and a branch of the said White river.

22 XIV. Your petitioners further allege that the said order of survey, survey and plat, and grant of which exhibits "A," "B," and "C" are copies which are filed, deposited, or recorded as herein alleged are the original instruments, that were executed and delivered to said Valliere as aforesaid, and that copies only of the same were given to said Valliere by said Carondelet and Trudeau as was at that time the custom and law of the said province, which copies have been lost or destroyed, and that your petitioners have been informed since the commencement of this action that the original order, of which exhibit "A" is a copy, was destroyed by fire during the late rebellion, which your petitioners believe to be true.

XV. Your petitioners further allege that the lands herein described and set forth, have not been in possession of and cultivated by the original claimant, or those holding title under him, for the period of twenty years prior to the filing of the petition in this action.

XVI. Your petitioners further allege that the lands supposed to be covered by the said claim, the said order of survey, survey and plat, and grant, according to the legal divisions and subdivisions of the surveys made by the United States, are situated, lying, and being on both banks and sides of the said White river, commencing at the extreme westerly source of the same, running therefrom and parallel with and adjoining said river, and being forty miles in depth on both banks and sides of said White river, and following the same to the points and places where the said White river is in-

tersected by the said Buffalo river, and the said Great North Fork of the White river, embracing all townships, sections, and parts of sections that are laid out on the United States survey, within the limits and distances of the aforesaid boundaries.

XVII. Your petitioners further allege that by the provisions in the treaty of cession from France to the United States, dated the 30th day of April, 1803, the said grant to said Captain Don Joseph Valliere, was fully protected and secured to him, likewise by the laws of nations.

Your petitioners, therefore, respectfully pray, that in accordance with said act of Congress, and the provisions therein contained, a copy of this amended petition be served upon the district attorney for this district and of this court, and that he be required to appear for the United States, and answer thereto, and that the claim or claims of your petitioners may be adjudged good and valid in all respects as against the United States; that said order of survey, survey and plat, and final grant, may be adjudged and decreed by this court good, valid, complete, and genuine title and evidence of title to said lands, in said Captain Don Joseph Valliere, his heirs and legal representatives, and for such other order, judgment, and decree, or relief, as to this court may seem just, proper, and equitable, and your petitioners will ever pray.

WM. H. DURYEA,
Solicitor for Petitioners,
82 *Nassau street, New York.*

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

William H. Duryea, being duly sworn, says he is one of the petitioners and plaintiffs named in the foregoing amended petition, and is the attorney for the petitioners therein named; that he has read the same and knows the contents thereof, and that said petition is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, he believes the same to be true; and the reason why this verification is not made by the other petitioners, or one of them, is that they are all absent from and reside out of the jurisdiction of this court, and that deponent's knowledge is founded upon the instruments upon which this action is brought, and the facts in said petition alleged, exemplified copies of the said instruments under official seal being in deponent's possession.

WM. H. DURYEA.

Sworn to before me, this 22d day of October, 1875.

R. STUART WILLIS, [SEAL.]
Notary Public for New York and Kings Cos.

23 EXHIBIT "A."

Al Capitan D'n Joseph Valliere en el Distrito de Arkansas, una porcion de tierra situada sobre el Rio Blanco, y extendi-

endo desde los Rio Norte grande, y cibolos, hasta el origen de dicho Rio Blanco, diez leguas en profundidad.

BARON DE CARONDELET.

EXHIBIT "B."

Don Carlos Trudeau, agrimensor R'l y Particular de la provincia de la Luisiana.

Certifico, que ha sido medido, y lindado, a favor y en presencia, de Don Joseph Valliere, Capitan del Regimiento fixo de la Luisiana una porcion de tierra situada en la Juridicion de Arkansas, sobre los margenes, Norte y Sur del Rio Blanco, lindado acia el Este, ó por el limite inferior Con el Rio Norte grande el Rio Blanco, y el Rio Cibolos, al Œsteó limite superior Con el frente, ó origen del Brazo mas occidental de dicho Rio Blanco, y Con tierras vacantes del Domino de S. M'd. Separado, del esta ultimas por una linea tirada desde el Dicho fuente, ó, Origen del Brazo mas occidental del Rio Blanco, Con un Curso Sur Œste de diez leguas en profondida, por la parte el Norte, Con tierras del Domino de S. M'd Separado de esta por una linea tirada desde el Rio Norte grande, Comensando—a un puñta distanta Diez leguas, en linea directa de Su embocadura, en el Rio Blanco, y Coriendo un Curso Casi Œste, Hasta de que Con el fuente ó origen del Brazo mas Œste del Rio Blanco, y por la—parte del Sur, Con tierras vacantes y del Domino de S. M'd. Separada de estas por una linea tirada, Separada, desde el punto endonde acaba el limite Sur Œste, diez leguas del fuente, ó origen del Brazo mas occidental del Rio Blanco, y Corriendo Sobre una linea paralela Con el Rio Blanco, Decendiendo Diez leguas en Su profondidad, Hasta que de Con el Cio Cibolo, a la dicha distancia de diez leguas en linea Recta desde el rio Blanco, el todo esta mas empliamente demustrado en el plano figurativo que antecede, en el qual estan Señaladas las dimenciones y Curso de los limites las arboles y mojones, Sirviendo de linderas artificiales y Naturales, las lineas y limites—Han Sido Hecha a solicitad del Interresado y en Complimiento del decreto del Señor gov'r gra'l el Baron de Carondelet, de diez—de junio, del Corriente año de todo lo'que doy fe y para que Sirve donde Convenga Doy la presente Con el plano figurativo que entecede a veinte y quatro, de octubre de mil Setecientos noventa y tres años.

(Signed,) CARLOS TRUDEAU, *Ag'e G'l.*

[Here follows map, marked page 23.]

EXHIBIT "C."

A. f. 39 del libro Real enque Constan Estractados los titulos espedidos, por les Governadores Intendentes, de la Florida occidental respectivos el ano de 1793 Se halla uno que dice así.

Don Francisco, Baron de Carondelet, &c., &c., &c.

Por Cuanto, en beneficio del publico y para el mayor fomento de

la agriculture é in industria del Pais, he juzgado á proposito tomar varias disposiciones para apear y Conceder los terrenos Realengos de esta Villa. Por tanta, Concedo a Don Joseph Valliere, Capitan del Regimento fixo de la Luisiana, una suerte de tierra en la jurisdicion de Arkansas. Situada en ambas orillas del Rio Blanco, diez leguas sobre ambas orillas de dicho Rio principiando desde dicho nacimiento del brazo mas occidental del Citado Rio Blanco, y Corriendo Sud Este diez leguas, bajando de alli, al sud de dicho Rio Blanco, en linea paralela Con dicho Rio Blanco, á la distancia de diez leguas hasta atravesar el Rio Cibolos, á un punto distante diez leguas linea recta Con dicho Rio Blanco, de alli, bajando dicho Rio Cibolos hasta su desagüe al Rio Blanco, siguiendo este hasta la embocadura de Rio Norte Grande, entrado al norte de alli, arriba de dicho Rio Norte Grande diez leguas en linea recta de su embocadura desde alli, subiendo dicho Rio Blanco, al norte del mismo en direccion occidental á la distancia de diez leguas del mismo hasta principio, el Cuel se vera mejor Con el plano figurativo formado de mijorden, por al agrimensor Real Don Carlos Trudeau de la Provincia en 24 de octubre ultimo, (hallandose el impossibilitado en la actualidad de levantar un plano y en virtud de mi decreto, de junio, del corriente año, por el Cual le hice merced y dispuse se le pusiera en la forma acostumbrada, usando desde luego de la facultad que Rey el nuestro, Señor, (Q. D. G.) me tiene conferida, octorgo en su Real nombre al dicho Don Joseph Valliere, Capitan del Regimento de Infanteria, de la Luisiana, la referida suerte de tierre Como Va mas arriba dicho y esplicado para que Como suya propia, disponga libremente de ella y la usufrute así él Como los que legitimente le succedieren.

Dado en Nueva Orleans á 22de Diciembre de 1793.

Fermado, EL BARON DE CARONDELET.

11 de JUNIO, 1793.

24 And afterward, at the said regular stated September term, 1875, of said court, and on Tuesday, November 9th, 1875, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJAMIN H. SCULL ET AL., HEIRS OF DON JOSEPH VALliere; W. H. Duryea et al., grantees of the heirs of Valliere, and John Wilson et al., Plaintiffs, } No. 1,115.
vs.
THE UNITED STATES, DEFENDANT.

On this day comes the district attorney, on behalf of the United States, and refiles the demurrer heretofore filed by him to the plaintiffs' petition to the amended petition of plaintiffs.

And the demurrer so filed is in the words and figures following, to wit:

In the United States District Court for the Western District of Missouri, at the September term, 1875.

BENJAMIN H. SCULL ET AL., PLTFFS.,
against
THE UNITED STATES, DEFDT.

And now, at this day, comes the said defendant, by her attorney for said district, and demurs to the amended petition of the plaintiffs in the above-entitled cause, and for causes of demurrer
25 assigns the following grounds:

First. Said petition does not state sufficient facts under the acts of Congress referred to therein to warrant the relief sought.

Second. Said plaintiffs have not filed with their said petition their evidence in support of their claim, including the originals of the alleged order of survey, survey and figurative plan and grant, copied in said petition, and of the alleged petition of said Captain Don Joseph Valliere to said Baron De Carondelet, on which said alleged order of survey was made.

Third. Said petition is not accompanied with a sworn statement by the claimants of the lands supposed to be covered by their claim, according to the legal divisions and subdivisions of the surveys made by the United States.

Fourth. Said petition does not show that the tract of land claimed by plaintiffs was ever separated from the mass of the public domain by actual survey.

Fifth. Said petition does not show that the land claimed by plaintiffs was ever separated from the mass of the public domain by definition of fixed natural and ascertainable boundaries or initial points, courses, and distances by the competent authority prior to the cession to the United States of the territory in which the lands claimed were included.

Sixth. Said petition does not show that the said lands are claimed by competent grant or concession, or order of survey duly executed.

26 Seventh. Said petition does not state sufficient facts to show that the land claimed was ever separated from the mass of the public domain.

Eighth. The said grant of the said Baron de Carondelet to said Captain Don Joseph Valliere, dated December 22, 1793, is void on account of the uncertainty and vagueness of the description contained therein.

Ninth. Said petition does not show that said Captain Don Joseph Valliere, or any person claiming under him, was placed in possession of the land claimed by the authorities of the government by whom said order of survey and grant were made.

Tenth. Said petition does not show that the lands claimed have been in possession of and cultivated by the original claimant, or those holding title under him, for a period less than twenty years.

Eleventh. Said petition does not show that the claimants, and those from whom they derive title, have held continuous possession of the land claimed from the date of the cession to the United States of the territory out of which the States of Florida, Louisana, and Missouri were formed.

Twelfth. Said petition states facts which show that the said grant has long since been abandoned.

Thirteenth. By virtue of the law of the land and of the provisions of the several acts of Congress applicable to the case, plaintiffs are not entitled to any relief in the premises.

27 Wherefore, and for divers other good causes of demurrer appearing in the said petition, the defendant doth demur thereto, and humbly demands the judgment of this court whether she shall be compelled to make any further or other answer to the said petition, and prays to be hence dismissed with her costs and charges in this behalf most wrongfully sustained.

JAMES S. BOTSFORD,
U. S. Attorney and Counsel for Defendant.

I certify that, in my opinion, the foregoing demurrer is well founded in point of law, and that it is not interposed for delay.

JAMES S. BOTSFORD,
Counsel for Defendant.

And afterward, at the said regular stated September term, 1875, of said court, and on Monday, the third day of January, 1876, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL., HEIRS OF DON JOSEPH VALLIERE,
Wm. H. Duryea et al., grantees, &c.,
vs.
THE UNITED STATES.
No. 1,115. Petition.

On this day, come the parties, the plaintiff by their attorneys, Wm. H. Duryea and Ewing & Smith, and the defendant by James S. Botsford, district attorney, when the demurrer heretofore

28 filed herein is taken up, argued by counsel and submitted, and by the court taken under advisement.

And afterwards, at a regular stated term of said court, begun and holden at the city of Jefferson, district aforesaid, on the first Monday, the sixth day of March, A. D. 1876, and on Friday, the 17th day of March, 1876, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJ. H SCULL ET AL., HEIRS OF DON JOS. VALLIERE,
Wm. H. Duryea et al.,
vs.
UNITED STATES.
No. 1,115.

On this day, depositions on behalf of the plaintiffs, Benj. H. Scull

et al., heirs of Don Joseph Valliere, Wm. H. Duryea et al., grantees of the heirs of Valliere, and John Wilson, are filed.

And the depositions so filed are in words and figures following, to wit:

District Court of the United States for the Western District Mo.

BENJAMIN H. SCULL ET AL., HEIRS OF DON JOSEPH VALLIERE, William H. Duryea et al., grantees of the heirs of Valliere, and John Wilson, Plaintiffs,
29 *against*
UNITED STATES OF AMERICA, DEFENDANT.

To Hon. James S. Botsford, United States district attorney for the western district of Missouri, and attorney for the defendant in the above case:

You are hereby notified that the deposition of Creed Taylor, on behalf of the plaintiffs, will be taken on the 30th day of September, 1875, at the Pine Bluff, Jefferson county, State of Arkansas, at the office of George B. Allis, a United States commissioner, between the hours of nine o'clock in the forenoon and six o'clock in the afternoon of that day; and if not completed on that day will be continued from day to day at the same place and between the same hours until completed. EWING & SMITH,
Att'ys for Plaintiffs.

On this 10th day of September, 1875, before me, appeared Louis Krauthoff, who being duly sworn, states that he served the within notice on James S. Botsford by delivering to him a true copy thereof on the 9th day of September, 1875, at the city of Jefferson, Missouri. LOUIS C. W. KRAUTHOFF.

Sworn to and signed before me, this 10th day of September, 1875, and I certify my commission is dated July 25th, 1875, and expires July 25, 1881.
30 Witness my hand and notarial seal, this 10th day of Sept., 1875.
[SEAL.] ASHLEY W. EWING,
Notary Public, Cole Co., Mo.

Deposition of Creed Taylor, taken on the 30th day of September, 1875, in pursuance of the notice hereto attached, at my office in the city of Pine Bluff, to be read as evidence in any action between—

BENJAMIN H SCULL ET AL., HEIRS OF DON JOSEPH Valliere; William H. Duryea et al., grantees of the heirs of Valliere, and John Wilson, Plaintiffs,
against
UNITED STATES OF AMERICA, DEFENDANT.

Pending in the District Court of the United States for the Western District of Missouri.

1st. Creed Taylor, witness for the plaintiffs, being first duly sworn, deposes and says:

My name is Creed Taylor.

My age is (75) seventy-five years.

My occupation, a farmer.

My residence, Jefferson county, Arkansas.

I know a part of the plaintiffs in this suit—those claiming to be the heirs of Don Joseph Valliere.

I married a granddaughter of Don Joseph Valliere, namely, Eulalie Vaugine, in the year 1821; she died in 1827, leaving three children; one of whom has since died; now living, two of
31 the said children, Anna E. Gracie and Mrs. Eulalie Vaugine Walker.

In the latter part of the year 1828 I married Mary Ann Valliere, daughter of Francis Valliere, son of Don Joseph Valliere; she died in 1838, leaving surviving her one son, namely, Samuel C. Taylor, who died in 1865, leaving three children, namely, Zock, Creed, and Maggie.

I never saw Don Joseph Valliere myself. But from my connection with the family and their statements, my information is that Don Joseph Valliere died in the city of New Orleans in the year 1799, and before the cession of the Territory of Louisiana to the United States, and died intestate, and there was no administration upon his effects, he at that time being an officer of the Spanish army.

Some time between the years 1850 and 1854, the precise time I cannot now recollect, I went in person to New Orleans, Louisiana, and examined the records of the cathedral of the Catholic church of New Orleans, and there found recorded the marriage of Don Joseph Valliere with Marie Felicite Moran, the date of which marriage I cannot now remember.

I also found the baptismal record of four of Don Joseph Valliere's children, the issue of this marriage, namely, Bernard Valliere, the eldest; 2nd, Marie Felicite Valliere; third, Francis Valliere; fourth, Eugenia Valliere.

I also saw there the marriage record of Marie Felicite Valliere with Captain Don Francis Vaugine *D'Neuisment*—this word
32 meaning of the Neuisment estate.

Captain Vaugine was the adjutant general of Don Joseph Valliere.

I knew Captain Vaugine well; it was his daughter I married first.

I saw the baptismal record of Marie Felicite Vaugine, daughter of the said Captain Vaugine, who afterwards married James Scull, sr., who was the lineal ancestor of part of the plaintiffs in this suit.

I also saw the baptismal record of Alienne Vaugine, son of the said Captain Vaugine, and the baptisimal record of Ateinnette

Vaugine and Francis N. Vaugine; also, Eulalie Vaugine, whom I married, in 1821.

There was another child of Captain Vaugine, namely, Paul Vaugine, but I do not recollect whether I saw his baptismal record or not; all of these were the issue of Captain Vaugine and Marie Felicite Valliere.

I took a copy of this record and kept it until the 25th day of January, 1873, when my residence was destroyed by fire and the papers that I had were burnt up.

The lineal descendants of Marie Felicite Valliere (commonly called Manet) who married James Scull, sr., and now living, are as follows:

Louisiana Scull, the oldest daughter;
Annie Norris, the next "
Henry W. Scull, and—
Ben. H. Scull,
John B. Scull,
33 Fayette Scull,
Fannie Scull,
Willie Scull,
Cordelia Scull,
Henry Scull, and—
James Scull;

the last named eight being the children of James Scull, jr., son of the James Scull, sr., who married Manet Valliere.

And James Tucker, who died, leaving two children, names unknown— ——— Tucker, now Mrs. Bebee—Emma Tucker, Hettie Tucker, Wood Tucker, children of Eliza Tucker and Hortwell Tucker. The said Eliza Tucker being a daughter of the said James Scull, sr., and Marié Felicite (or Manet) his wife.

The descendants of Francis Vaugine, the son of the late Captain Francis Vaugine, and now living, are Frank Vaugine, Philip Vaugine, and Marius Jenkins; Jenkins' children of Louisiana Jenkins, formerly Louisiana Vaugine—now dead.

The lineal descendants of Eulalie Vaugine, afterward Taylor, are as follows:

Annie E. Gracie—Eulalie Vaugine Walker—both formerly Taylor.

The only lineal descendant of Paul Vaugene, son of the said Capt. Francis Vaugine, now known, is Mary Cruben, daughter of Harriet Vaugine, afterwards Cruben, and daughter of said Paul Vaugine.

The lineal descendants of Francis Valliere, son of Don Joseph Valliere, who are now living, are as follows: Elizabeth
34 Hinton, who is the granddaughter of said Francis Valliere, Zock, Creed, and Maggie Taylor, who are the children of Sam. C. Taylor, who died, and great grandchildren of Francis Valliere, and grandchildren of Marie Ann Taylor, formerly Valliere.

Mary Felicite Valliere, daughter of the said Francis Valliere, married one Achillis Gordon; I know nothing of their descendants now.

There may be now and was at one time two other daughters of Francis Valliere, jr., or Francis Dotribe Valliere, as he was generally known, and who was a son of the said Francis Valliere, who may be living or have children living and interested in this suit.

In ———— there was a suit instituted in the United States court at Little Rock, Arkansas, for the confirmation of this grant, but was never determined, the case having been dismissed for want of prosecution. Since 18— I have been intimately connected with the grant in question and have been the leading manager in the matter, and know of my own knowledge that there was no intention on the part of any of the claimants to abandon said claim, nor have they done any act to indicate such intention so far as I have ever known. I first got a certified copy of the grant with the certificate of the American consul, now in possession of the attorneys in this case, about the year 1848 or 1849. Most of the heirs and parties interested in this claim are and have been in indi-
35 gent circumstances and not able to expend any money in the prosecution. Ever since I have known the family or anything of this claim there has continually been minor children interested in it or who had rights. These, with the difficulties in the several acts of Congress and the war between the states, have operated to delay the prosecution of this suit.

The portrait of Don Joseph Valliere is still in my family as a relic.

Further deponent saith not.

CREED TAYLOR.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF ARKANSAS,
JEFFERSON COUNTY.

I, George B. Allis, a commissioner of the United States within and for the eastern district of Arkansas, do hereby certify that the foregoing deposition of Creed Taylor was taken before me, and was read to and subscribed by him in my presence at the time and place in the action mentioned in the caption. The said Creed Taylor having been first sworn by me, that the evidence he should give in the action should be the truth, the whole truth, and nothing but the truth, and his statements reduced to writing by me in his presence, the plaintiffs, by E. W. Martin, their attorney, alone being present at the examination.

Given under my hand and seal, this the 30th day of September, A. D. 1875.

[SEAL.]

GEO. B. ALLIS,
U. S. Commissioner, Eastern Dist. of Ark.

Comm'r's fees, $4.80.

36 And afterwards, at the said regular stated March term, A. D. 1876, of said court, and on Monday, the 20th day of March, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL., HEIRS OF DON JOS. Valliere, Wm. H. Duryea et al., *vs.* UNITED STATES. } No. 1, 115.

On this day comes the district attorney on behalf of the United States, and also comes the plaintiffs, Benjamin H. Scull et al., heirs of Don Jos. Valliere, Wm. H. Duryea et al., by Ewing & Smith, of counsel, and the court being now fully advised as to the law upon the third clause of the demurrer, heretofore filed to the plaintiffs' petition, is of opinion that the same is for the defendant, and in conformity with such opinion, it is ordered that said demurrer, as to the third clause thereof be and the same is sustained, and thereupon, on motion, leave is granted the plaintiffs to file an amended petition.

And afterwards, at the said regular stated March term, A. D. 1876, of said court, and on Thursday, the 6th day of April, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

37 BENJAMIN H. SCULL ET AL., HEIRS OF DON JOS. Valliere, and Wm. H. Duryea et al., *vs.* THE UNITED STATES. } No. 1,115.

On this day come the plaintiffs, by H. C. Ewing, of counsel, and also comes the district attorney on behalf of the United States, when on motion leave is by the court granted the plaintiffs to file second amended petition, which second amended petition is thereupon filed, as also sworn statement as to lands supposed to be contained in and covered by survey, certified copy of survey and also certified copy of grant, which last-named paper is by leave of court retained for safe keeping, in the custody of H. C. Ewing, attorney.

And thereupon on motion it is ordered that the district attorney have leave to plead to the 2d amended petition of plaintiffs by May 15th, 1876.

And the second amended petition so filed is in words and figures with exhibits as following, to wit:

38 District Court of the United States in and for the Western District of the State of Missouri.

BENJAMIN H. SCULL, JOHN B. SCULL, LA FAYETTE SCULL, Francis Scull, William Scull, Louisiana Scull, Henry Scull, Zacharie Taylor, Creed Taylor, Margaret Taylor, Mary Ellen Tucker, Emma Tucker, Nettie Tucker, Wood Tucker, Annie Norris, Frank Vaugine, Philip Vaugine, James Scull, Cornelia Scull, Mildred Scull, Fannie Scull, J. H. Jenkins, T. A. Henton, Elizabeth Henton, Mary Francis Hunter, Sarah Jane Valliere, Peter Mitchell, E. D. Trietts, Louisa Trietts, Eularlie V. Walker, Melina C. Roth, Augustus Vaugine, La Fayette Vaugine, Francis Vaugine, Mary Ellen Vaugine, Amelia Beebe, Mary Ellen Strong, Annie E. Gracie, Mary Crubin, heirs of Don Joseph Valliere, and William H. Duryea, grantee of said heirs, Plaintiffs,

against

THE UNITED STATES, DEFENDANT.

The amended petition of the above-named plaintiffs, in behalf of themselves, and all persons who have an interest in or claim to the lands described herein, by William H. Duryea, their solicitor, respectfully shows to this honorable court, and under and in pursuance of an act of Congress of the United States, passed June 22, 1860, entitled "An act for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri, and for other purposes," and the act of Congress of the United States, passed June, 1872, reviving said act of 1860, alleges as follows:

I. That during the year A. D. 1793, and several years prior thereto and thereafter, the Province of Louisiana belonged to the government of Spain, and that during the time aforesaid said Province of Louisiana embraced a large tract of land or territory of which land or territory the States of Arkansas and Missouri are now a part.

II. That during the year A. D. 1793, Baron de Carondelet was governor-general of said Province of Louisiana, acting as such governor-general, under and for the King of Spain, with full power and authority in him vested by the King of Spain to grant and confirm titles to lands in said province to the subjects of said government of Spain, and to execute and deliver the grant or grants hereinafter mentioned.

III. That on or about the 11th day of June, 1793, the said Baron de Carondelet, as governor-general aforesaid, upon the petition of one Captain Don Joseph Valliere, a then resident of said province, made an order of survey of a tract of land situated upon the White river, and on each side thereof, within the said Province of Louisiana, and within what is now the States of Arkansas and Missouri, in favor of said Valliere, and upon his petition, and duly delivered the same to Don Carlos de Trudeau, at that time the royal and private surveyor of the said Province of Louisiana, for the purpose of having said lands surveyed for the benefit of said Valliere; that

said order of survey is in the words and figures, and in substance and purport following, to wit:

"11th June, 1793, to Captain Don Joseph Valliere, in the district of Arkansas, a tract of land, situated on the White river, extending from the rivers Norte Grande and Cibolos to the source of the said White river, ten leagues in depth.

"BARON DE CARONDELET."

39 That said order of survey is recorded in the land office at New Orleans, State of Louisiana, in Book No. 4, entitled "Register de los Primeros Decretos de Concession de tierra," in volume 6 thereof, page 31, which register and record forms a part of the archives of that office.

IV. That on or about the 18th day of June, 1793, the said Don Carlos Trudeau, surveyor-general aforesaid, in pursuance of said order of survey, surveyed and made a plat or survey of said tract of land in said order mentioned, and duly signed, sealed, and delivered the same on or about the 24th day of October, 1793, and that said survey is in the words and figures, and in substance and purport following, to wit:

Don Carlos Trudeau, royal and private surveyor of the Province of Louisiana. "I certify having measured in favor and in presence of Don Joseph Valliere, captain of the stationary regiment of Louisiana, a portion of land situated in the jurisdiction of Arkansas, on the north and south banks of Rio Blanco, Rio Cibolos, on the west or superior limit by the fountain-head or origin of the most western branch of the said Rio Blanco, and by vacant lands of his majesty, separated from said vacant lands by a line beginning at the said fountain-head of the northwestern branch of Rio Blanco, running southwest ten leagues in depth on the north by the lands of his majesty, separated from these by a drawn line beginning at the Rio Norte Grande, commencing at a point distant ten leagues in a direct line from its mouth or confluence with the Rio Blanco, running in a course nearly west until it meets the fountain-head or origin of the most western branch of the Rio Blanco, and on the south side by vacant lands of his majesty, separated from these by a line drawn apart, beginning at a point where ends the southwest limit, ten leagues from the fountain-head or origin of the most western branch of the Rio Blanco, running on a parallel line with the said Rio Blanco, descending ten leagues in depth, until it meets Rio Cibolos, at a distance of ten leagues in a direct line from Rio Blanco. All of which is now fully demonstrated in the figurative plan which precedes, in which is artificial or natural boundaries. The line and limits have been made at the request of the grantee, and in compliance with the order from the governor-general, Baron de Carondelet, 18th June, present year. I certify to all which precedes in order that it may be verified.

"I delivered the present, with the figurative plan, 24th October, 1793.

(Signed) CHARLES TRUDEAU,
Surveyor-General."

That said survey, together with a map or plat thereof, is recorded and filed in the surveyor-general's office of Louisiana, at New Orleans, in Bundle Letter "N" No. 37, and is a part of the record and archives of that office.

V. That on or about the 22d day of December, 1793, the foregoing survey having been made and returned in pursuance of the order or grant aforesaid, the said governor-general of the Province of Louisiana, by the power and authority in him vested, executed and delivered to the said Captain Don Joseph Valliere, a grant of the lands described in the said survey and map, or plat thereto annexed, by an instrument in writing dated December 22, 1793, which grant is in words and figures, and in substance and purport following, to wit:

DON FRANCISCO, Baron De Carondelet, &c., &c.

For the benefit of the public, and for the greater encouragement of agriculture and industry of the country, I have judged it expedient to take steps for surveying and granting the royal lands to province.

Therefore, I grant to Don Joseph Valliere, captain of the regiment stationed in Louisiana, a portion of land in the jurisdiction of Arkansas, situated on both banks of the Rio Blanco, ten leagues on both banks, beginning at the origin of the most western branch of the Rio Blanco, and running southwest ten leagues, descending from thence on the south by parallel line with the Rio Blanco at the distance of ten leagues until it intersects Rio Cibolos at a point ten leagues in a direct line with Rio Blanco. From thence descending Rio Cibolos to its confluence with Rio Blanco. Following this as far as the mouth of Rio Norte Grande, up the same to a point ten leagues in a direct line from its mouth. From thence ascending Rio Blanco to the north in a westerly direction ten leagues from the same, as far as its source, which will be better seen on the figurative plan made by my order by the surveyor-general, Don Carlos Trudeau, of this province, 24th of October last (it being impossible for the royal surveyor to make an actual survey at this time), and in virtue of my order in June of the current year, by which I made him a grant and ordered the surveyor-general to put him in possession according to the usual form. In consequence of the power which has been conferred on me by our lord the king (God preserve), I grant in his royal name to the said Don Joseph Valliere, captain of the regiment of infantry of Louisiana, the said portion described above, in order that he may

dispose of it, he and his legitimate successors, as property belonging to him.

Done in New Orleans, 22d December, 1793.

EL BARON DE CARONDELET."

That said grant is recorded in the office of the general custodian of the archives of the Royal Treasury of the Island of Cuba, at Havana, in the Book of Grants of the king's lands in Florida and other provinces, at folio thirty-nine thereof, and the government of Spain, from the time she made and executed said grant up to the present time, has been and is now in the lawful possession of the same, and she is the proper and legal custodian thereof.

VI. That by the execution and delivery of the grant last aforesaid, and the preliminary grant or order of survey, and the survey itself, the said Captain Don Joseph Valliere became absolutely vested with the title of the lands described therein, by competent authority, prior to the cession to the United States of the territory in which said lands were included, and such title was created and perfected in said Valliere during the period while the government of Spain, from which it emanated, claimed sovereignty over or had the actual possession of such territory; and said lands, in said grant described thereby, became separated from the public domain of and by the said government of Spain, by definition of fixed, natural, and ascertainable boundaries, initial points, courses, and distances, prior to the cession to the United States of the territory in which the lands claimed were included, and became the private property of said Captain Don Joseph Valliere for him to hold to himself, his heirs, and assigns forever.

VII. Your petitioners further allege that the said Captain Don Joseph Valliere died intestate in the city of New Orleans, State of Louisiana, in or about the year 1799, and died seized of all the said lands and premises.

VIII. Your petitioners further allege that all the lands described in said grant have been surveyed by the United States and laid out into divisions and subdivisions, and in surveying said lands the lines were extended over the said White river, which was meandered so that its exact courses are laid down on the township plats of the United States surveys, and your petitioners are informed by the Commissioner of the General Land Office of the United States that an actual survey of the lands described in said grant is not necessary, and that a diagram may be prepared by calculations based upon the United States surveys already made, showing the actual extent of said grant, all of which your petitioners believe to be true, and your petitioners therefore pray that an order be entered by this honorable court, at an early day, directing such a diagram to be made under the direction of the said commissioner based upon the surveys already made as aforesaid, and when so made the same be forwarded to this court to be used as evidence upon the trial of this cause.

IX. That a portion of the lands described in said grant are situated, lying, and being in the counties of Ozark, Douglass, Taney, Christian, Stone, and Barry, of the State of Missouri, and are within the jurisdiction of this court; and your petitioners are informed and believe that the greater part if not all the lands described in said grant have been disposed of by the defendant, and your petitioners pray that they may be allowed upon the trial to show by competent evidence what portion of the said grant now remains undisposed of and claimed by the defendant.

X. That your petitioners are informed that there are other persons who claim to have some interest in the said lands, and that their names are at present unknown, and your petitioners pray that their names, when ascertained, may, upon application of your petioners upon the trial of this cause, be inserted in this petition and the proceedings herein.

XI. That your petitioners are the lawful descendants and surviving heirs of said Don Joseph Valliere, and grantees of the heirs of said Valliere, and as such are the true and lawful owners in fee of said lands, and have a just and equitable claim thereto, their interest in said lands being undivided and as tenants in common.

XII. That copies of the said order of survey marked "A," survey and plat marked "B," and final grant marked "C," are hereto annexed and made part of this petition, and that certified copies of the said survey and grant, as evidence of the same, are herewith filed.

41 XIII. Your petitioners further allege that Rio Blanco, as herein alleged in paragraphs III., IV., and V., and set forth in exhibits "A," "B," and "C," is the White river of the State of Arkansas, having its source in the most westerly part thereof, running through the southwesterly portion of the State of Missouri, and thence through the said State of Arkansas and emptying into the Mississippi river; that Rio Cibolos, as herein alleged in said paragraphs and set forth in exhibits "A," "B," and "C," is the Buffalo river, a branch of the said White river; that Rio Notre Grande, as herein alleged in said paragraphs and set forth in exhibits "A," "B," and "C," is the Great North Fork river of the State of Arkansas and a branch of the said White river.

XIV. Your petitioners further allege that the said order of survey, survey and plat, and grant, of which exhibits "A," "B," and "C" are copies, which are filed, deposited, or recorded as herein alleged, are the original instruments that were executed and delivered to said Valliere as aforesaid, and that copies only of the same were given to said Valliere by said Carondelet and Trudeau as was at that time the custom and law of the said province, which copies have been lost or destroyed, and that your petitioners have been informed, since the commencement of this action, that the original order of which exhibit "A" is a copy was destroyed by fire during the late rebellion, which your petitioners believe to be true.

XV. Your petitioners further allege that the lands herein described and set forth have not been in possession of and cultivated by the original claimant or those holding title under him for the period of twenty years prior to the filing of the petition in this action.

XVI. Your petitioners further allege that the lands supposed to be covered by the said claim, the said order of survey, survey and plat, and grant, according to the legal divisions and subdivisions of the surveys made by the United States, are situated, lying, and being on both banks and sides of the said White river, commencing at the extreme westerly source of the same, running therefrom and parallel with and adjoining said river, and being 37⅛ miles in depth on both banks and sides of said White river, and following the same to the points and places where the said White river is intersected by the said Buffalo river and the said Great North Fork of the said White river, embracing all townships, sections, and parts of sections that are laid out on the United States survey within the limits and distances of the aforesaid boundaries, more particularly shown and demonstrated by a sworn statement, with diagram and survey annexed, and herewith filed, reference being thereunto had.

XVII. Your petitioners further allege that by the provisions in the treaty of cession from France to the United States, dated the 30th day of April, 1803, the said grant to said Captain Don Joseph Valliere was fully protected and secured to him, likewise by laws of nations.

Your petitioners, therefore, respectfully pray that, in accordance with said acts of Congress and the provisions therein contained, a copy of this amended petition be served upon the district attorney for this district and of this court, and that he be required to appear for the United States and answer thereto, and that the claim or claims of your petitioners may be adjudged good and valid in all respects as against the United States; that said order of survey, survey and plat, and final grant may be adjudged and decreed by this court good, valid, complete, and genuine title and evidence of title to said lands in said Captain Don Joseph Valliere, his heirs and legal representatives, and that said title be thereby confirmed in all respects, and that it be decreed by this honorable court that the defendant issue a patent to the plaintiffs and their legal representatives for so much of the said lands as remain undisposed of by the defendant, as provided in section 11 of said act of 1860; and that it be further decreed that the defendant issue warrants or scrip to said petitioners and their legal representatives, to be located as provided in section 6 of said act of 1860, as an equivalent for that portion of the said grant disposed of by the defendant, and for such other order, judgment, and decree as to this court may seem just and proper, and your petitioners will ever pray.

WM. H. DURYEA,
Solicitor for Petitioners,
82 *Nassau street, New York.*

42 STATE OF NEW YORK,
CITY OF BROOKLYN, } ss.
KING'S COUNTY.

William H. Duryea, being duly sworn, says he is one of the plaintiffs in the foregoing entitled cause, and is attorney for the other parties therein named as plaintiffs; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to these matters he believes the same to be true; and the reason why this verification is not made by the other plaintiffs, or one of them, is that they are absent from this state, where deponent resides, and that deponent's knowledge is founded upon instruments in writing, upon which the foregoing action is based, certified copies of said instruments being in deponent's possession.

WM. H. DURYEA.

Sworn to before me, this 29th day of March, 1876.

[SEAL.] R. STUART WILLIS, *Notary Public, New York & King's Co's.*

43 EXHIBIT "A."

Al Capitan D'n Joseph Valliere en el Distrito de Arkansas, una porcion de tierra situada sobre el Rio Blanco, y extendiendo desde los Rio Norte grande, y cibolos, hasta el origen de dicho Rio Blanco, diez leguas en profundidad.

BARON DE CARONDELET.

EXHIBIT "B."

Don Carlos Trudeau, agrimensor R'l y Particular de la provincia de la Luisiana.

Certifico, que ha sido medido, y lindado, a favor y en presencia, de Don Joseph Valliere, Capitan del Regimiento fixo de la Luisiana una porcion de tierra situada en la Juridicion de Arkansas, sobre los margenes, Norte y Sur del Rio Blanco, lindado acia el Este, ó por el limite inferior Con el Rio Norte grande el Rio Blanco, y el Rio Cibolos, al Œsteó limite superior Con el frente, ó origen del Brazo mas occidental de dicho Rio Blanco, y Con tierras vacantes del Domino de S. M'd. Separado, del esta ultimas por una linea tirada desde el Dicho fuente, ó Origen del Brazo mas occidental del Rio Blanco, Con un Curso Sur Œste de diez leguas en profondida, por la parte el Norte, Con tierras del Domino de S. M'd Separada de esta por una linea tirada desde el Rio Norte grande, Comensando—a un puñta, distanta Diez leguas, en linea directa de Su embocadura, en el Rio Blanco, y Coriendo un Curso Casi Œste, Hasta de que Con el fuente ó origen del Brazo mas Œste del Rio Blanco, y por la—parte del Sur, Con tierras vacantes y del Domino

de S. M'd. Separada de estas por una linea tirada, Separada, desde el punto endonde acaba el limite Sur (Este, diez leguas del fuente, ó origen del Brazo mas occidental del Rio Blanco, y Corriendo Sobre una linea paralela Con el Rio Blanco, Decendiendo Diez leguas en su profondidad, Hasta que de Con el Cio Cibolo, a la dicha distancia de diez leguas en linea Recta desde el rio Blanco, el todo esta mas empliamente demustrado en el plano figurativo que antecede, en el qual estan Señaladas las dimenciones y Curso de los limites las arboles y mojones, Serviendo de linderas artificiales y Naturales, las lineas y limites—Han Sido Hecha a solicitad del Interresado y en Complimiento del decreto del Señor gov'r gra'l el Baron de Carondelet, de diez—de junio, del Corriente año, de todo lo que doy fe y para que Sirve donde Convenga Doy la presente Con el plano figurativo que entecede a veinte y quatro, del octubre de mil Setecientos noventa y tres años.

(Signed,) CARLOS TRUDEAU, *Ag'e G'l.*

[Here follows map, marked page 43.]

EXHIBIT "C."

A. f. 39 del libro Real enque Constan Extractados los titulos espedidos, por les Governadores Intendentes, de la Florida occidental respectivos el año de 1793 Se halla uno que dice así.

Don Francisco, Baron de Carondelet, &c., &c., &c.

Por Cuanto, en beneficio del publico y para el mayor fomento de la agriculture é in industria del pais, he juzgado á proposito tomar varias disposiciones para apear y Conceder los terrenos Realengos de esta Villa. Por tanta, Concedo a Don Joseph Valliere, Capitan del Regimento fixo de la Luisiana, una suerte de tierra en la jurisdicion de Arkansas. Situada en ambas orillas del Rio Blanco, diez leguas sobre ambas orillas de dicho Rio principiando desde dicho nacimiento del brazo mas occidental del Citado Rio Blanco, y Corriendo Sud (Este diez leguas, bajando de alli, al sud de dicho Rio Blanco, en linea parelela Con dicho Rio Blanco, á la distancia de diez leguas hasta atravesar el Rio Cibolos, á un punto distante diez leguas linea recta Con dicho Rio Blanco, de alli, bajando dicho Rio Cibolos hasta su desagüe al Rio Blanco, siguiendo este hasta la embocadura de Rio Norte Grande, entrado al norte de alli, arriba de dicho Rio Norte Grande diez leguas en linea recta de su embocadura desde alli, subiendo dicho Rio Blanco, al norte del mismo en direccion occidental á la distancia de diez leguas del mismo hasta principio, el Cuel se vera mejor Con el plano figurativo formado de mijorden, por al agrimensor Real Don Carlos Trudeau de la Provincia en 24 de octubre ultimo, (hallandose el impossibilitado en la actualidad de levantar un plano y en virtud de mi decreto, de junio, del corriente año, por el Cual le hice merced y dispuse se le pusiera en la forma acostumbrada, usando desde luego de la facultad que Rey el nuestro, Señor, (Q. D. G.) me tiene conferida,

octorgo en su Real nombre al dicho Don Joseph Valliere, Capitan del Regimento de Infanteria, de la Luisiana, la referida suerte de tierre Como Va mas arriba dicho y esplicado para que Como suya propia, disponga libremente de ella y la usufrute así él Como los que legitimente le succedieren.

Dado en Nueva Orleans á 22de Diciembre de 1793.

Fermado, EL BARON DE CARONDELET.

11 de JUNIO, 1793.

44 And the sworn statements as to lands supposed to be contained in and covered by survey so filed is, together with exhibits therein, referred to and thereto attached, in words and figures following, to wit:

District Court of the United States, Western District of Missouri.

BENJAMIN H. SCULL ET AL., PLAINTIFFS,
vs.
THE UNITED STATES, DEFENDANT.

CITY, COUNTY, STATE OF NEW YORK, *ss:*

William H. Duryea, being duly sworn, says he is one of the claimants in the above-entitled action, and is the attorney of record for the other claimants, who are plaintiffs herein; that the annexed plat or survey, marked Exhibit G, are the lands or a diagram thereof, supposed to be covered by the claim of the plaintiffs, according to the legal divisions and subdivisions of the surveys made by the United States.

That the annexed letter, marked Exhibit "D," is a letter of instructions received by deponent from the Commissioner of the General Land Office in reference to said claim, and that the diagram hereto annexed, marked Exhibit "F," accompanied said letter, and is the diagram therein referred to; the grant or said claim being located thereon by said commissioner by officially stamping upon said diagram the words: "Terminal or source of the White
45 River," Buffalo Fork," "Initial point or confluence of Big North Fork & White River," and tracing the said White river by a blue line, as shown upon said diagram, and that said diagram has not been changed or modified, and nothing has been added thereto since the same was received from said commissioner by this deponent.

That Exhibit "E" is a letter received by this deponent from said commissioner in reference to said claim or grant, and as to the necessity of any actual survey.

W. H. DURYEA.

Sworn to before me, this 27th day of March, 1876.

[SEAL.] R. STUART WILLIS,
Notary Public, New York & Kings Co's.

Exhibit D

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January 22d*, 1876.

WM. H. DURYEA, Esq., New York.

SIR: I have received your letter of the 12th inst., covering copy of petition, embracing copies of alleged grant of land in favor of Capt. Joseph Valliere, made by Baron de Carondelet, gov-
46 ernor-general of the Province of Louisiana, June 11, 1793.

You request that I furnish you with a map of the land granted, to wit: a tract of land situated on White river, extending from the rivers Norte Grande and Cibolos to the source of the said White river, ten leagues in depth, and the amount of acres or square miles it contains.

In reply I have to say that, upon examination of records in this office, bearing on the subject, it does not appear that the alleged grant has ever been confirmed by the United States or that it has been presented for confirmation to Congress. The records, however, show that it was brought before the U. S. dt. court at Little Rock, Arkansas, by petition for confirmation, and that all proceedings in the case were dismissed for want of prosecution.

Such being the status of the alleged grant, I do not deem it expedient to take any steps, looking to the initiation of proceedings tending to define the limits of the grant, by laying down on the map its boundaries and computing the area of the grant, until it is confirmed by Congress and authority is given to this office to have the same surveyed in accordance with such confirmation.

In order, however, to enable you to approximately calculate the contents of the land embraced within the grant, I transmit a diagram of the State of Missouri and part of Arkansas, showing the lines of public surveys therein, the location of White river, its source, and other rivers referred to in the alleged grant to Joseph Valliere, observing at the same time that the area of squares
47 or townships represented on the diagram include 23,040 acres or six miles square each more or less.

I am, very respectfully, your obt. servt.,

L. K. LIPPINCOTT,
Acting Commissioner.

Exhibit E

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *February 3d*, 1876.

WM. H. DURYEA, Esq., 82 *Nassau street, N. Y. City.*

SIR: I acknowledge the receipt of your letter of the 25th ultimo, relative to the Valliere grant, wherein you state that the grant has been presented to the U. S. dist. court for the western dist. of Mo. for confirmation, and that you deem it necessary that a survey of the grant should be made before confirmation under the direction of the court.

You also inquire whether White river of Ark. and Mo. has been surveyed, &c.; also, whether if the proper tribunal ordered a survey of the said grant, this office would consider an actual survey necessary, or whether a descriptive survey would be furnished, based upon the U. S. surveys already made.

In reply I have to say that said river has not been surveyed by itself, but in surveying the public lands the lines were ex-
48 tended over it and it was meandered so that its exact course is laid down on the tp. plat.

This course was indicated approximately on the diagram inclosed with letter to you on the 22d ult.

Should the proper authority require a survey to show the actual extent of this grant, a diagram may be prepared by calculations based upon the U. S. surveys already made.

Very respectfully, your obt. servant,

L. K. LIPPINCOTT,
Acting Commissioner.

EXHIBITS F AND G.

(Here follow 2 maps, marked page 48.)

49 District Court of the United States, Western District of Missouri.

BENJAMIN H. SCULL ET ALS.
vs.
THE UNITED STATES.

CITY OF BROOKLYN, KINGS COUNTY, AND STATE OF NEW YORK, } *ss.*

George H. Day, being duly sworn, says he is a practical city surveyor, duly appointed as such by the city of Brooklyn, and has been such city surveyor for and during the period of twenty-five years last past; that he is familiar with the surveys made by the United States of its public lands, and fully understands the manner in which such surveys are made, in making initial points, bearings, and extending the lines thereof, and particularly as to the surveys made by the United States of the lands of Arkansas and Missouri and of the meanderings of the White river of Arkansas, and how and in what manner the same were made, and as shown upon the diagram hereto annexed, marked Exhibit "F;" that he has read the amended petition in the above-entitled action, and knows the contents thereof; that he made the plat or map hereto annexed, marked Exhibit "G," in conformity with the final grant, of which Exhibit "C," in said petition, is a copy, and the process verbal of the survey made by Trudeau, of which Exhibit "B" is a copy, and also in conformity with the diagram hereto annexed, marked
50 Exhibit "F," having before him at the same time the letters of the land commissioner hereto annexed, marked Exhibit

"D and E;" that the said grant actually locates the land therein described by definition of fixed natural and ascertainable boundaries, initial points, courses, and distances, and that the outside boundary-lines of said grant as fixed by me as shown upon said Exhibit "G," and the whole thereof is a true and faithful diagram, description, and extent of the lands covered by said grant, and contains all the divisions and subdivisions of the United States surveys within said boundary-lines thereof, and that my certificate in writing of the courses and distances of said boundary-lines and a description of the grant is hereto annexed.

GEO. H. DAY.

Sworn to before me, this 27th day of March, 1876.

[SEAL.] R. STUART WILLIS,
Notary Public, New York and Kings Cos.

51 Description of a tract of land granted to Captain Don Joseph Valliere, in the District of Arkansas, by Baron de Carondelet, 22d Dec., 1793, situated on both sides of White river (or Rio Blanco), in the States of Missouri and Arkansas, extending from the north fork of White river (or Rio Norte Grande) westerly to its source 37⅞ miles in depth on both sides (or 10 leagues).

Beginning at the origin or terminal of main fork of White river in Madison county, Ark., in T. 13, N. range 25 west, from thence south 37⅞ miles (or ten leagues) to a point in township 7, north range 25 W.; thence continuing on a line drawn parallel with the main courses of the said White river and at a distance of 37⅞ miles therefrom (or ten leagues) on a line drawn north of west thirty-three and one-half (33½) miles to a point in township 8 north and range 31 west; thence northwesterly 52 $\frac{7}{10}$ miles to a point in the Indian Territory or Cherokee county near Flint creek; thence north by east 46 $\frac{7}{10}$ miles to a point in township 23 north, range 34 west in McDonald Co., Mo.; thence northeasterly 60 $\frac{8}{10}$ miles to a point in township 28 north, range 26 west in Lawrence Co., Mo.; thence easterly 48 miles to a point in township 29 north, and range 18 west, and distant from a point on White river 37⅞ miles (or ten leagues); thence southeasterly 45 $\frac{6}{10}$ miles to a point on the Big North Fork of White river in township 24 north, and range 12 west, distant

52 37⅞ miles (or ten leagues) northerly in a direct line from the mouth of the north fork of said White river; thence southerly down the north fork of White river (or Rio Norte Grande) to its mouth in township 18 north, range 12 west; thence southwesterly up the White river to the mouth of Buffalo fork of White river; thence westerly, following said Buffalo fork (or Rio Cibolos) to its source in township 14 north, range 24 west; thence southwesterly to the terminal or source of White river, the place of beginning, as more fully shown on the map annexed, containing 11,370 square miles.

GEO. H. DAY,
City Surveyor.

BROOKLYN, N. Y., Feb'y 14th, 1876.

53 And the certified copy of survey and the certified copy of the grant so filed with said second amended petition are in words and figures following, to wit:

54 [Here follows map, marked page 54.]

Don Carlos Trudeau agrimenson Rl. y particular de la Provincia de la Louisiana, &c., &c. Certifico que ha side medido, y lindando a favor y en presencio de Don Joseph Valliere Capitain del Regiment fix o de la Louisana una porcion de tierra situada en la Juridicion de Arkansas sobre los margenos, Notre y sur del Rio Blanco, lĩndado acia el este õ por el limite inferior, con el Rio Nonte Grande, el Rio Blanco y el Rio Cibolos al œsta õ limite superior con el frente, õ original del braso mas occidental del dhõ. Rio Blanco y con tierres Vacantes del Domico de su Md. separada de esta ultima, par una tinea tracta des de el Dhõ. frente õ origin del Brazo mas occidental del Rio Blanco cun un curso sur oueste de diez leguas en profundidad por la parte del Norte, con tierra, Del Dominio de S. M. soparada de esta, par una linea tierra de desde el Rio Norte Grande comensada aun punto distate Diez legues, en linea directa de sue embocadura en al Rio Blanco, y corienta un curso, casi oesta, hasta que de anel frento õ vacantes, y del Dominio de S. M. separada de esta par una linea tirad separada, des de el punta en don de acaba el limite sur oeste diez lugues del frente õ origin del brazo mas occidental del Rio Blanco, y corienta sobre una linea paralala con el Rio Blanco, decendiendo diez leguas en su profonctidad hasta que de con el Rio Cibolos, a la Dha. distancia de Diez leguas en linea recta des de Rio Blanco—El tode mas emplicmente de maes trado en el plano figurativo que antecede, en el que estan siñ a la des las dimenciones y curso de los limitres, los arbotes, y mofoner siriendo de tinderas aritificales, y naturales Las lineas y limites har side hechas a solicitud del enteresado y en complimento del decreto del Seña Gov'r Genl. el Baron de Carondelet de Diez Junio del corriento año de to do to que doy fe y de Octobre de mil sete cientos noventa y tres años. CARLOS TRUDEAU, *Agr'l.*

STATE OF LOUISIANA,
CITY OF NEW ORLEANS, *June* 4, 1875.

I hereby certify the foregoing to be a true and literal copy
55 of the original plat and process verbal of survey on file among the records of the late surveyor-gen'l of this state—L. Bringier—in "Bundle N," No. 1 to 67, and in possession this office. JOHN RAY. [SEAL.]

Register of State Land Office, and Custodian of Surveyor-Gen'l Records.

STATE OF LOUISIANA,
OFFICE OF SECRETARY OF STATE.

I hereby certify that John Ray is and was, at the date of the annexed instrument, register of the state land office in and for the State

of Louisiana in said state, and his attestation thereof is in accordance with law, and his signature thereto is genuine.

Given under my hand and the seal of the state, this fifth day of June, A. D. 1875, and of the independence of the United States of America the ninety-ninth.

P. G. DESLONDE,
Secretary of State.

Translation of the survey of Don Carlos Trudeau.

Don Carlos Trudeau, royal and private surveyor of the province of Louisiana.

I certify having measured, in favor and in presence of Don Joseph Valliere, captain of the stationary regiment of Louisiana, a portion of land situated in the jurisdiction of Arkansas, on the north and south banks of Rio Blanco; bounded on the east, or on the inferior limit, by the Rio Norte Grande, the Rio Blanco, and the Rio Cibolos; on the west, or superior limit, by the fountain-head or origin of the most western branch of the said Rio Blanco and by vacant lands of his majesty; separated from said vacant lands by a line beginning at the said fountain-head of the most western branch of Rio Blanco, running southwest ten leagues in depth; on the north by the lands of his majesty, separated from these by a drawn line, beginning at the Rio Norte Grande, commencing at a point ten leagues distant in a direct line from its mouth or confluence with the Rio Blanco, running in a course nearly west until it meets the fountain-head or origin of the most western branch of the Rio Blanco, and on the south side by vacant lands of his majesty, separated from these by a line drawn apart, beginning at a point where ends the southwest limit, ten leagues from the fountain-head or origin of the most western branch of the Rio Blanco, running on a parallel line with said Rio Blanco descending, ten leagues in depth, until it meets Rio Cibolos, at a distance of ten leagues in a direct line from Rio Blanco. All of which is now fully demonstrated in the figurative plan which precedes—in which are shown the dimensions and courses of the boundaries, the trees and monuments serving as artificial and natural boundaries. The lines and limits have been made at the request of the grantee and in compliance with the order of the governor-general, Baron de Carondelet, of the —— of June of the present year. All of which I certify that it may be everywhere valid. I give these presents, together with the figurative plan which precedes, on the 24th of October, 1793.

CARLOS TRUDEAU,
Surveyor-General.

It is ordered that the foregoing translation be annexed to the certified copy survey now on file in this court, in the case of Scull and

others vs. The United States, (the same having been furnished by claimant.) A. KREKEL, *Judge.*

[STAMP.] [STAMP.]

Don José del Rosario Nattes, Intendente honorario de Prova. y Archivero general de Real Hacienda y Junta de Jomen tode la Isla de Cuba por S. M.

Certifico: que en el libro en que el Gobierno Espanol de la Florida Occidental, registraba los titulos que espedia por concesio net de tierras vacantes ó realengas, en el año de mil setenin tos noventa y tres, y que se halla en las oficios de mi cargo, reunido á los demas papeles de aguellas Provincias se encuentra a la foja treinta y nueve vuelto el titulo sigmente. "D. Francisco, Baron de Carondelet, &c. Por cuanto en beneficio del publico, y para mayor formento de la Agriculture é industria del pais, he juzgado aproposito tomar varias disposiciones para apear y conceder los terrenos realengos de esta Villa. Por tanto concedo á D. Joseph Valliere, Capitan del Regimento Fijo de la Luisiana, una suerte de tierra en la jurisdicion de Arkansas, situadas en ambas, orillas del rio Blanco, diez leguas sobre ambas orillas de dicho rio, principiando desde el naumient del brazo mas occidental del estado rio Blanco y corriendo Sudueste diez leguas, bajando de alli al Sur de dicho rio Blanco en linea paralela con dicho rio Blanco á la distancia de diez leguas hasta atraveras el rio Civolos á un punto distante, diez leguas linea resta condicho rio Blanco, de alli bajando dicho rio Civolos hasta sue de sague al rio Blanco siguiendo este hasta la embocadura del rio Norte grande, entrando al Norte de alli arriba del dicho rio Grande diez leguas en linea recta de su embocadura desde alli subienda dicho rio Blanco al Norte del mismo en direccion occidental
a la distancia de diez leguas del mismo hasta su principio;
56 el cual se verá mejor en el plano figurativo formado de mi orden por el agrimensor Real. D. Carlos Trudeau de la Provincia de la Luisiana en veinte y cuatro de Octubre ultimo (hallandose el impossibilitado en la actualidad de levantor un plano) y en virtud de mi decreto de Junio del corriente año por el cual le hué merced, y dispuse se le pusiera en posecion en la forma acostumbrada Ysando desde luego de la facultad que el Rey me tiene conferida, otosgo en su Rl. nombre al dicho D. Joseph Valliere, Capitan del Regimento de Infanteria de la Luisiana la referida suerte de tierra como va mas arriba dicho y seplicado parra que como suya propia disponga libremente de ella, asi el como los que legitimamente le sucedieren. Dado en la Nueva Orleans à veinte y dos de Diciembre de mil ceientos noventa y tres—El Baron de Carondelet.

Yen virtud de decreto de esta fecha del Eserño Sor Conde de Villa, unera Superintendente grăl. Delegado de Real Haciendo de esta Isla sobre enstancia de Mr. Baldwin doy la presente con vista de dicho Libro que queda en impoder y Archivo à que me remito. Habana y enero diez de mil ochocientos cuarenta y ocho.

JOSE DEL BOS' NATTER.

Y. Los Escribanos del Real Colegio desta cuidad que aqué siguamos y fix, mamos Certificamos y damos fé que Dn. Joci del Rosario Nattes, es Intendente honorario de Provincia y archives general de Real Hacienda y Junta de Vomentes dela Isla de Cuba fiel legal y de la mayor con, fiansa, husa y egree lu ministeria Con general aprobacion y aters semefantes Siunpre seles hadad y da enter credito en ambos junio. Gr. pare que asi conste donde convenga damos laprecente Sellada conel que no es concedido Habana y Ener diez de mil ochocientos cecurenta y ocho condt.

[3 SEALS.]

FRAN'CO DE HROVEDO.
VICT'E RODRIG'L PERE.

JUAN DE ENSRALGDÉ.
[SEAL.]

CONSULATE OF THE UNITED STATES,
HAVANA, *Jan'y* 11, 1848.

I, Robert B. Campbell, consul of the United States of America for the city of Havana, do hereby certify that Juan de Entralgo, Francisco de Guovedo, and Vict Rodrigues Peres, whose signatures and rubrics appear to the certificate on the preceding page of this sheet, are notaries public of the royal college of notaries public of the city of Havana, and that their official acts are, in my opinion, entitled to faith and credence.

In testimony whereof, I have hereto set my hand and affixed the seal of my office, at Havana, on the day of the date above written.

[SEAL.] ROBERT CAMPBELL.

57 And afterwards in vacation and on Monday, the 1st day of May, 1876, the following further entry appears of record herein, to wit:

BENJAMIN H. SCULL ET AL., HEIRS OF DON JOSEPH Valliere, W. H. Duryea et al.,
vs.
THE UNITED STATES. } No. 1,115.

On this day comes Jean Baptiste Valliere, by Lay & Belch and Boyd and Sanders, his solicitors, and files motion to be joined with the complainants in the above-entitled cause.

And the motion so filed is in words and figures following, to wit:

In the District of the United States for the Western Dist. of Mo.

BENJAMIN H. SCULL ET AL.
against
THE UNITED STATES.

In the above cause now comes Jean Babtiste Valliere, a resident of the county of Bell, in the State of Texas, and moves the court

that he be joined with the complainants in the above cause and allowed to set up and maintain his rights and interest in the lands set forth in complainants' bill.

Because, he says, he is a son and heir of Joseph Valliere, a son of Captain Don Joseph Valliere, the original grantee of the land
58 as set forth in complainants' bill, and as such is the owner of an undivided interest in said land as tenant in common with the other owners of said lands.

JEAN BAPTISTE VALLIERE,
By LAY & BELCH,
Who, with Boyd & Sanders, are his Solicitors.

And afterwards, at the said regular stated March term, A. D 1876, of said court, and on Wednesday, the 10th day of May, 1876, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL., HEIRS OF DON JOS. VALLIERE, and Wm. H. Duryea et als.
vs.
THE UNITED STATES. } No. 1,115.

On this day come the plaintiffs, by H. C. Ewing, of counsel, and also comes the district attorney on behalf of the United States, when, on his motion, it is ordered by the court that the district attorney have leave to plead to the several amended petitions of plaintiffs by June 15th, A. D. 1876.

And afterward, at the said regular stated March term, A. D. 1876, of said court, and on Monday, the fifth day of June, 1876, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

59 BENJ. H. SCULL ET AL.
vs.
The UNITED STATES. } No. 1,115.

On this day comes the district attorney, on behalf of the United States, and files a demurrer to plaintiffs' second amended petition herein.

And the demurrer so filed is in words and figures following, to wit:

In the U. S. District Court for the Western District of Missouri, at the March Term, 1876.

BENJAMIN H. SCULL ET AL., PLAINTIFFS,
against
THE UNITED STATES, DEFENDANT.

And now at this day comes the said defendant, by her attorney for said district, and demurs to the amended petition of plaintiffs

filed April 6, 1876, and for causes of demurrer assigns the following grounds:

First. Said amended petition does not state sufficient facts under the acts of Congress referred to therein to warrant the relief sought.

Second. Said amended petition does not contain an abstract of the title of the claimants.

Third. This court has no jurisdiction of this case as to petitioners,
James S. Scull, Cornelia Scull, Mildred Scull, Fannie Scull,
60 J. H. Jenkins, T. A. Hinton, Elizabeth Hinton, Mary Francis Hunter, Sarah Jane Valliere, Peter Mitchell, E. D. Trietts, Louisa Trietts, Melina C. Roth, Augustus Vaugine, La Fayette Vaugine, Francis Vaugine, Mary Ellen Vaugine, Amelia Beebe, Mary Ellen Strong, and Mary Cruben, they having become parties since June 10, 1875, and having been joined as petitioners by said amended petition without the leave of said court.

Fourth. Said amended petition does not show that the lands claimed have been in possession of and cultivated by the original claimant or those holding title under him for a period less than twenty years.

Fifth. Said amended petition does not show that the tract of land claimed was ever separated from the mass of the public domain by actual survey.

Sixth. Said amended petition does not state facts which show that the land claimed was ever separated from the mass of the public domain by definition of fixed natural and ascertainable boundaries or initial points, courses, and distances by the competent authority prior to the cession to the United States of the territory in which the lands claimed were included, but plaintiffs make that averment as a conclusion of law from their title papers set out by them in their said amended petition.

Seventh. Said amended petition does not show that the said
61 lands are claimed by complete grant or concession or order of survey duly executed.

Eighth. The said grant of the said Baron de Carondelet to said Valliere, dated December 22, 1793, is void on account of the uncertainty and vagueness of the description contained therein.

Ninth. Said amended petition states facts which show that the said grant has long since been abandoned, because it is not alleged in said petition that said claim does not come within the perview of the 3rd section of the act of 1860, approved June 22nd, 1860; nor are any facts alleged in said petition to show that the said claim does not come within perview of said third section of said act.

Tenth. By virtue of the law of the land and of the provisions of the several acts of Congress applicable to the case, plaintiffs are not entitled to any relief in the premises.

Wherefore and for divers other good causes of demurrer appearing in the said petition, the defendant doth demur thereto and humbly demands the judgment of this court, whether she shall be com-

pelled to make any further or other answer to the said petition, and prays to be hence dismissed with her costs and charges in this behalf most wrongfully sustained.

JAMES S. BOTSFORD,
U. S. Attorney,
with M. T. C. WILLIAMS,
Asst. U. S. Attorney.

62 I certify that in my opinion the foregoing demurrer is well founded in point of law, and that it is not interposed for delay. JAMES S. BOTSFORD,
Counsel for Defendant.

And afterwards, at the said regular stated March term, 1876, of said court, and on Monday, the 3rd day of July, 1876, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL.
vs.
THE UNITED STATES. } No. 1,115.

On this day comes the district attorney on behalf of the United States, and on his motion it is ordered that this cause be, and the same is, continued to the next September term of this court.

And afterwards, at a regular stated term of said court, begun and held in the city of Jefferson, district aforesaid, on the first Monday, the 4th day of September, A. D. 1876, and on Monday, the eighteenth day of September, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL., HEIRS OF DON. JOS. VALIERE,
Wm. H. Duryea et al.,
vs.
THE UNITED STATES. } No. 1,115. Petition.

63 On this day come the plaintiffs, by H. C. Ewing, of counsel, and also comes the district attorney, on behalf of the defendant, when the demurrer to the second amended petition is taken up, argued by counsel, submitted, and by the court taken under advisement.

And afterward, in vacation, and on Wednesday, the twenty-fifth day of October, A. D. 1876, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL., HEIRS OF DON JOSEPH
Valliere, and Wm. H. Duryea et al.,
vs.
THE UNITED STATES. } No. 1,115. Petition.

On this day an application is filed by W. K. Hall, by his attorneys, E. L. Edwards & Son, to be made a party plaintiff in this action.

And the application so filed is in words and figures following, to wit:

In the District Court of the United States, Western District of Missouri.

BENJAMIN H. SCULL ET AL.
vs.
THE UNITED STATES.

Now, at this day, comes W. K. Hall, of the county of Hickman in the State of Kentucky, and moves the court to permit him to join with the complainants in this cause, and that he may
64 be allowed to set up and maintain his rights and interest in the lands set forth and *and* described in the plaintiffs' petition, for the following reasons:

1st. Because he, the said W. K. Hall, is the true and lawful owner of a certain interest in said land claimed in plaintiffs' petition, derived from the heirs of said Joseph Valliere through the heirs and legal representatives of the said Joseph Valliere, and other mesne conveyances transmitting title to plaintiff to a part of said lands.

E. L. EDWARDS & SON,
Attys. for Hall.

And afterwards, in vacation, and on Monday, the 20th day of November, A. D. 1876, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL., HEIRS OF DON JOSEPH VALliere, Wm. H. Duryea et al.,
vs.
THE UNITED STATES. } No. 1,115.

On this day comes John Whitbeck, by E. L. Edwards & Son and Wm. E. Hart, his attorneys, and files petition to be joined with the complainants in the above-entitled cause.

And the petition so filed is in words and figures following, to wit:

In the District Court of the U. S. for the Western Dis. of Mo.

65 SCULL ET AL., PLAINTIFFS,
against
THE UNITED STATES, DEFENDANT.

To the hon. the judge of the said court:

Respectfully shows unto your honor your petitioner, John Whitbeck, of the town of West Point, county of King William, in the State of Virginia, that about the 7th day of January, 1846, he purchased of one John Wilson "all the undivided one-half part of the following described tracts or parcels of land, lying on the waters of the White river, in the State of Missouri, viz: township twenty-eight north and range twenty-one west, and also township twenty-nine north

and range twenty-one west," and that said John Wilson conveyed the same to your petitioner by deed, dated the 7th day of January, 1846, and duly recorded in the office of the recorder of deeds for the county of Greene, in said state.

That said John Wilson acquired title to said lands by and by virtue of a deed executed to him by one Creed Taylor, attorney in fact for the heirs of Don Joseph Valliere, who acquired his title to said lands by virtue of a grant from the Spanish government.

Your petitioner shows that he has not been able to get the possession of the tracts or parcels of land in his said deed mentioned and conveyed or intended so to be.

Your petitioner is advised that his rights in the premises can be adjudicated and fully determined in the suit of Scull and others against the United States, now pending in this honorable
66 court, and that he ought of right to be one of the parties to said suit, because the tracts or parcels of land conveyed to your petitioner are parts and parcels of the original grant to said Valliere, and were conveyed to the grantor of your petitioner by the heirs of said Valliere, by their legally constituted attorney.

Your petitioner therefore prays that he may be made a party plaintiff in said suit, to the end that he may be enabled properly to assert and maintain his just rights in the matter in controversy.

JOHN WHITBECK,
By WM. E. HART,
His Counsel.

VIRGINIA,
KING WILLIAM COUNTY, } *to wit:*

This day, personally appeared before the undersigned, a notary public in and for the county of King William, in the state aforesaid, John Whitbeck, whose name is signed to the foregoing petition, and made oath in due form of law, that the matters and things in said petition stated and set forth are true.

Given under my hand and official seal, this 30th day of October, 1876.

[SEAL.]

W. D. COLLARD,
Notary Public for King Wm. Co., Virginia.

67 And afterwards, at a regular stated term of said court, begun and holden at the city of Jefferson, district aforesaid, on the first Monday, the 3rd day of September, A. D. 1877, and on Friday, the 30th day of November, 1877, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL.
vs.
THE UNITED STATES. } No. 1,115.

Now at this day come the parties, the plaintiffs, by H'y C. Ewing, of counsel, and the district attorney on behalf of the United States,

and file a stipulation that the judgment of this court upon the demurrer to the second amended petition may not be entered until the first Monday in February, A. D. 1878.

And the stipulation so filed is in words and figures following, to wit:

District Court United States, Western District Mo.

SCULL AND OTHERS } *against* THE UNITED STATES.

And now come the parties to the above case, the plaintiffs by their attorney, H. C. Ewing, and the United States by the district attorney, and hereby stipulate that the judgment of the court upon the demurrer to the petition may not be entered until the
68 first Monday in February, 1878, so as to enable plaintiffs to perfect their appeal when the judgment shall be entered.

SCULL AND OTHERS,
By H. C. EWING.
A. W. MULLINS,
Dist. Attorney.

And afterward, at the said regular stated September term, 1877, of said court, and on Monday, the 3d day of December, 1877, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL. *vs.* THE UNITED STATES. } No. 1,115.

On reading the petition of Jean Baptiste Valliere, heretofore filed herein, praying to be made a party plaintiff to this suit, and it appearing to the court from said petition that the said Jean Baptiste Valliere is interested in the subject-matter of the controversy in like manner as the original complainants herein, and that he is a proper party plaintiff—

It is, therefore, on motion of Mr. A. M. Lay, of counsel for said Valliere, ordered, that said Jean Baptiste Valliere be, and he is hereby, made a party plaintiff to this suit, and that he may adopt the bill on file herein, or file a supplemental bill as he may be advised.

69 And afterward, at the said regular stated September term, A. D. 1877, of said court, and on Monday, the 3rd day of December, 1877, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL. *vs.* THE UNITED STATES. } No. 1,115.

Now, at this day, come E. L. Edwards & Son, attorneys for W.

H. Hall, who had heretofore filed a petition to be made a party plaintiff herein, and suggests to the court that since the filing of said petition the said W. H. Hall has departed this life, and on their motion it is ordered that Mary A. Hall, widow, and J. Hall and John F. Hall, minor heirs of the said W. H. Hall, by their guardian, T. F. McConnell, be made parties complainants in this suit, and that they have leave to adopt the amended petition in this cause as their petition, or to file supplemental petition herein, if they prefer.

And afterward, at the said regular stated September term, A. D. 1877, of said court, and on Monday, the 3d day of December, 1877, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL.
vs.
THE UNITED STATES.

On reading the separate petitions of John Whitbeck and
70 Joseph M. Fisher, heretofore filed herein, that they be joined with complainants herein as plaintiffs in this cause and allowed to set up and maintain their rights and interests in the land set forth and described in the petition in this case, it is now, on motion of E. L. Edwards & Son, attorneys for said petitioners, ordered that the said John Whitbeck and Joseph M. Fisher be, and they are hereby, made parties complainants in this suit, and that they have leave to adopt the amended petition in this cause as their petition, or to file supplemental petition herein, if they prefer.

And afterward, at the said regular stated September term, A. D. 1877, of said court, and on Monday, the 3d day of December, 1877, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL.
vs.
THE UNITED STATES. } No. 1,115.

Now, at this day, comes John Wilson, one of the parties of the original bill in this cause, but who was omitted in the amended bills filed herein without his consent, by his attorneys, Waters & Winslow, and files a motion for an order reinstating him to his original position on the record and for leave to file such pleadings as may be necessary to protect his interests in this cause.

Whereupon, it is ordered by the court that said John Wilson be, and the same is hereby, made a party complainant in this suit,
71 and that he have leave to adopt the amended petition in this cause as his petition or to file supplemental petition herein, if he prefers.

And the motion so filed is in words and figures following, to wit:

In the District Court of the United States, September term, 1877.

BENJAMIN SCULL ET AL.
vs.
UNITED STATES.

John Wilson, one of the parties to the original bill in this cause, but who was omitted in the amended bill filed herein, without his consent, comes and moves the court for an order reinstating him to his original position on the records, and for leave to file such pleadings as may be necessary to protect his interests in this cause.

WATERS & WINSLOW,
Solicitors for said Wilson.

And afterward, at the said regular stated September term, A. D. 1877, of said court, and on Monday, the 3rd day of December, 1877, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL.
vs.
THE UNITED STATES. } No. 1,115.

Now, at this day, come Jean Baptiste Valliere, by Lay &
72 Belch, his solicitors, and Joseph M. Fisher, John Whitbeck, Mary A. Hall, widow of W. K. Hall, and J. Hall and John F. Hall, minor heirs of W. K. Hall, by their guardian, T. W. McConnell, by E. L. Edwards & Son, their solicitors, and with leave of court severally adopt the amended bill of complaint filed herein as fully as if they had been parties to the original bill and amendments thereto filed herein, and file such adoption in writing.

And the adoptions so filed are in words and figures following, to wit:

In the District Court of the United States for the Western District of Missouri.

BENJAMIN H. SCULL ET AL.
vs.
THE UNITED STATES.

And now comes Jean Baptiste Valliere, who, pursuant to the order of this court, was heretofore, on his petition therefor, made a party complainant herein, and by leave given by said order he adopts as his bill of complaint herein the amended bill of complaint filed herein as fully as if he had been an original party complainant herein.

LAY & BELCH,
Solicitors for said Valliere.

In the District Court of the United States, Western District of Missouri.

73 BENJAMIN H. SCULL ET AL.
vs.
THE UNITED STATES.

Now, at this day, comes Joseph M. Fisher, who, pursuant to the

order of this court, on his petition heretofore filed, was made a party plaintiff and complainant herein, and by leave given him by said order, he adopts the amended bill of complaint filed herein as fully as if he had been a party to the original bill of complaint herein.

JOSEPH M. FISHER,
By E. L. EDWARDS & SON,
Attys. for Fisher.

In the District Court of the United States, Western District of Missouri.

BENJAMIN SCULL ET AL.
vs.
THE UNITED STATES.

Now, at this day, comes John Whitbeck, who, pursuant to the order of this court, on his petition heretofore filed, was made a party plaintiff herein, and by leave given him by said order, he adopts the amended bill of complaint filed herein as fully *as fully* as if he had been a party to said original bill and amendments thereto filed herein.

E. L. EDWARDS & SON,
with W. E. HART,
Attys. for Whitbeck.

74 In the District Court of the United States, Western District of Missouri.

BENJAMIN SCULL ET AL.
vs.
THE UNITED STATES.

Now, at this day, come Mary A. Hall, widow of W. K. Hall, and J. and John F. Hall, minor heirs of W. K. Hall, by their guardian, T. W. McConnell, heirs-at-law of William K. Hall, deceased, who in his life-time filed a petition to be made a party plaintiff in the original bill of complaint filed herein, and who, by the order of this court heretofore made, have been permitted to prosecute their interest in this suit in the place of their deceased ancestor, and who have been made a party plaintiff in said bill of complaint, and by leave given them in said order adopt the amended bill of complaint as fully as if they had been a party to the original bill of complaint.

E. L. EDWARDS & SON,
Attys. for Pltffs.

And afterward, at the said regular stated September term, A. D. 1877, of said court, and on Monday, the 3d day of December, 1877, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL.
vs.
THE UNITED STATES. } No. 1,115.

75 Now, at this day, comes John Wilson, by his attorneys, Waters & Winslow, and files his adoption of the amended bill herein and joins in the allegations thereof,

And the adoption so filed is in words and figures following, to wit:

In the District Court of the United States for the Western District of Missouri.

BENJAMIN SCULL ET AL., PLAINTIFF,
against
UNITED STATES, DEFENDANT. }

Now comes John Wilson, by his attorneys, Waters & Winslow, and adopts the amended petition filed herein, and joins in the allegations thereof.

WATERS & WINSLOW,
Attys. for said Wilson.

And afterward, at the said regular stated September term, 1877, of said court, and on Monday, the 4th day of February, 1878, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL., HEIRS OF DON JOS. VALLIERE, and W. H. Duryea et al.,
vs.
THE UNITED STATES. } No. 1,115.

Now, at this day, come the plaintiffs herein, by Henry C. Ewing and W. H. Duryea, of counsel, and with leave of court file a
76 translation of the final grant filed herein on April 6th, 1876.

And the translation of said grant so filed is in words and figures following, to wit:

Don Jose del Rosario Nattes, honorary intendent of the province and general custodian of the archives of the royal treasury and of the board of public improvements for the Island of Cuba, by her majesty,

Do certify, that in the book in which the Spanish government of West Florida registered the titles which it issued for grants of vacant or the king's lands, in the year one thousand seven hundred and ninety-three, and which exists in the offices in my charge, attached to the other papers of the said provinces, is found, at folio thirty-nine, the following title:

For the benefit of the public and for the greater encouragement of agriculture and industry of the country, I have judged it expe-

dient to take steps for the surveying and granting the royal lands of the provinces,

Therefore, I grant to Don Joseph Valliere, captain of the regiment stationed in Louisiana, a portion of land in the jurisdiction of Arkansas, situate on both banks of the White river, ten leagues on both banks, beginning at the origin of the most western branch or source of the White river, and running southwest ten leagues,
77 descending from thence on the south by parallel line with White river, at the distance of ten leagues, until it intersects the Buffalo river at a point ten leagues in a direct line with White river, from thence descending the Buffalo river to its confluence with the White river; following this as far as the mouth of the Great North Fork of the White river, up the same to a point ten leagues in a direct line from its mouth, from thence ascending the White river to the north in a westerly direction ten leagues from the same as far as its source, which will be better seen on the figurative plan made by my order by the surveyor-general, Don Carlos Trudeau, of this province, 24 Oct. last, (it being impossible for the royal surveyor to make an actual survey at this time,) and in virtue of my order in June, of the current year, by which I made him a grant and ordered the surveyor-general to put him in possession, according to the usual form, in consequence of the power which has been conferred on me by our lord the King, (God preserve,) I grant, in his royal name, to the said Don Joseph Valliere, captain of the regiment of infantry of Louisiana, the said portion described above, in order that he may dispose of it, he and his legitimate successors, as property belonging to him. Done in New Orleans, 22 Dec., 1793.

EL BARON DE CARONDELET.

And by virtue of the decree of this date of his excellency Senor Conde de Vallaneuve, general superintendent delegate of the royal treasury of this island, and upon the petition of Mr. Baldwin
78 I issue these presents in view in accordance with the said book, which remains in the archives and in my possession, to which I refer.

Habanna, January tenth, one thousand eight hundred and forty-eight.

JOSE DEL ROSARIO NATTER.

The notaries public of the royal college of this city, who hereunto sign and affix their signets, do certify and attest that Don Jose del Rosario Nattes, by whom the foregoing certificate is authenticated, is the faithful legal and of the utmost confidence honorary intendant of the province and the general custodian of the archives of the royal treasury and for the board of public improvements of the Island of Cuba, and that he exercises his ministry with general approbation, and that to his acts always has been and is given entire faith in both judicatives (civil and ecclesiastical), and it may thus

appear where it may be expedient in faith, whereof we issue these presents sealed with the seal which is granted us.

["OFFICIAL SEAL."

Habanna, 10 January, one thousand eight hundred and forty-eight.

TEODOR DE ENTRALZO OR JEAN.
FRANCO DE ES. ESCORENDO.
VICTO RODREG' PERA.

CONSULATE OF THE UNITED STATES,
HABANA, *Jany.* 11, 1848.

I, Robert B. Campbell, consul of the United States of
79 America for the city of Havana, do hereby certify that Jean de Entralzo, Francisco de Es. Escercido, Victor Rodrigoes Pera, whose signatures and rubbrics appear to the certificate on the preceding page of this sheet, are notaries public of the royal college of the notaries public of the city of Havana, at that their official acts are in my opinion entitled to faith and credence.

In testimony whereof I have hereto set my hand and affixed the seal of my office, at Havana, on the day above written.

[SEAL.] ROBERT B. CAMPBELL.

And afterward, at the said regular stated September term, A. D. 1877, of said court, and on Monday, the 4th day of February, A. D. 1878, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJAMIN H. SCULL, JOHN B. SCULL, LAFAYETTE SCULL, Francis Scull, William Scull, Louisiana Scull, Henry Scull, Zacharie Taylor, Creed Taylor, Margaret Taylor, Mary Ellen Tucker, Emma Tucker, Nettie Tucker, Wood Tucker, Annie Norris, Frank Vaugine, Philip Vaugine, James Scull, Cornelia Scull, Mildred Scull, Fanny Scull, J. H. Jenkins, T. A. Hinton, Elizabeth Hinton, Mary Francis Hunter, Sarah Jane Valliere, Peter Mitchell, E. D. Trietts, Louisa Trietts, Eulalie V. Walker, Melina C. Roth, Augustus Vaugine, Lafayette Vaugine, Francis Vaugine, Mary Ellen Vaugine, Amelie Beebe, Mary Ellen Strong, Annie E. Gracie, Mary Crubin, heirs of Don Joseph Valliere, and William H. Duryea, grantee of said heirs; Annie E. Gracie, Eulalie V. Walker, John T. Doyle, D. P. Barnard, George W. Parsons, Joseph M. Fisher, Jean Baptiste Valliere, John Whitbeck, Mary A. Hall, widow of W. K. Hall, J. and John Hall, minor heirs of W. K. Hall, by their guardian, F. W. McConnell, and John Wilson, Plaintiffs,

80

against

THE UNITED STATES, DEFENDANT.

This cause came on to be heard upon the second amended petition of the plaintiffs in the above-entitled cause, filed April 6th, 1876, and the demurrer of the defendant to the same, and was
81 argued by counsel, and thereupon and upon consideration of all the papers and evidence filed in this cause said demurrer was sustained and the grant alleged and set forth in said petition is hereby adjudged and declared invalid, and the bill of complainants is hereby dismissed; and that the defendant have and recover of the petitioners her costs herein, and that she have execution thereof.

And afterward, at the said regular stated September term, A. D. 1877, of said court, and on Monday, the 4th day of February, A. D. 1878, an adjourned day thereof, the following further entry appears of record in this cause, to wit:

BENJ. H. SCULL ET AL.
vs.
THE UNITED STATES. } No. 1,115.

And now come the following of the plaintiffs herein, to wit: Benjamin H. Scull, John B. Scull, Lafayette Scull, Francis Scull, William Scull, Louisiana Scull, Henry Scull, Zacharie Taylor, Creed Taylor, Margaret Taylor, Mary Ellen Tucker, Emma Tucker, Nettie Tucker, Wood Tucker, Annie Norris, Frank Vaugine, Philip Vaugine, James Scull, Cornelia Scull, Mildred Scull, Fannie Scull, J. H. Jenkins, T. A. Henton, Elizabeth Henton, Mary Francis Hunter, Sarah Jane Valliere, Peter Mitchell, E. D. Trietts, Louisa Trietts, Eulalia V. Walker, Melina C. Roth; Augustus Vaugine, Lafayette Vaugine, Francis Vaugine, Mary Ellen Vaugine,
82 Amelie Beebe, Mary Ellen Strong, Anne E. Gracie, Mary Crubin, heirs of Don Joseph Valliere, and William H. Duryea, grantee of said heirs, and file their petition for an appeal to the Supreme Court of the United States from the judgment and decision of this court, which is hereby allowed, and the clerk of this court is hereby ordered to send up a complete transcript of the record and proceedings in the case to the first day of the next term of the said Supreme Court of the United States.

And it is further ordered, that the clerk transmit with the record the original papers in the case, including the maps and plats and copy of original grant and exhibits.

And it is still further ordered that said appellants file a bond for costs in the sum of three hundred dollars.

And thereupon such bond in the sum of three hundred dollars, signed by Wm. H. Duryea, H. W. Long, H. Clay Ewing, A. M. Lay, E. L. Edwards, and W. S. Pope, is filed and approved by the court.

And now a citation duly signed by the judge of this court is filed.

And the petition for appeal so filed is in words and figures following, to wit:

District Court of the United States in and for the Western
83 District of the State of Missouri.

BENJAMIN H. SCULL, JOHN B. SCULL, LAFAYETTE SCULL, Francis Scull, William Scull, Louisiana Scull, Henry Scull, Zacharie Taylor, Creed Taylor, Margaret Taylor, Mary Ellen Tucker, Emma Tucker, Nettie Tucker, Wood Tucker, Annie Norris, Frank Vaugine, Philip Vaugine, James Scull, Cornelia Scull, Mildred Scull, Fannie Scull, J. H. Jenkins, T. A. Henton, Elizabeth Henton, Mary Francis Hunter, Sarah Jane Valliere, Peter Mitchell, E. D. Trietts, Louisa Trietts, Eulalie V. Walker, Melina C. Roth, Augustus Vaugine, Lafayette Vaugine, Francis Vaugine, Mary Ellen Vaugine, Amelia Beebe, Mary Ellen Strong, Annie E. Gracie, Mary Crubin, heirs of Don Joseph Valliere, and William H. Duryea, grantee of said heirs, Plaintiffs,

against

THE UNITED STATES, DEFENDANT.

To the Honorable the Dist. Court of the United States:

84 The petition of appeal of the above-named plaintiffs and appellants respectfully showeth—

First. That on the 19th day of May, 1875, the above-named plaintiffs and appellants, Benjamin H. Scull, John B. Scull, Lafayette Scull, Francis Scull, William Scull, Louisiana Scull, Henry Scull, Zacharie Taylor, Creed Taylor, Margaret Taylor, Mary Ellen Tucker, Emma Tucker, Nettie Tucker, Wood Tucker, Annie Norris, Frank Vaugine, Philip Vaugine, heirs of Don Joseph Valliere, and William H. Duryea, together with certain other persons, erroneously supposed at that time to have an interest in the claim hereinafter mentioned, filed their petition in behalf of themselves and all persons having an interest in said claim under and in pursuance of an act of Congress passed June 22d, 1860, entitled "An act for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri, and for other purposes," and the act of Congress of June, 1872, reviving said act of 1860.

That in and by said petition it was alleged that on the 11th day of June, 1793, Baron de Carondelet, as governor-general of the then Spanish Province of Louisiana, granted in full and complete ownership to Don Joseph Valliere a tract of land, which is now situated in the States of Missouri and Arkansas, and is fully described in said petition, and the said petitioners thereby prayed that
85 the said grant might be adjudged valid, and that they might have the relief provided for in and by said acts of Congress, to which petition the United States was made defendant.

Second. That thereafter, upon the 7th day of September, 1875, the said defendant filed its demurrer, and thereupon, on the 20th

day of October, 1875, the said plaintiffs, by leave of the court, filed an amended petition.

Third. That on the 9th day of November, 1875, the defendant refiled its said demurrer to the amended, and thereupon, and with leave of the court, and on the 6th day of April, 1876, the said plaintiffs, heirs of Don Joseph Valliere, and William H. Duryea, grantee as aforesaid, filed a second amended petition, from which were omitted the said persons erroneously supposed to have an interest in said claim, and to which were added as petitioners the plaintiffs and appellants James Scull, Cornelia Scull, Mildred Scull, Fannie Scull, J. H. Jenkins, T. A. Henton, Elizabeth Henton, Mary Francis Hunter, Sarah Jane Valliere, Peter Mitchell, E. D. Trietts, Louisa Trietts, Eulalie V. Walker, Melina C. Roth, Augustus Vaugine, Lafayette Vaugine, Francis Vaugine, Mary Ellen Vaugine, Amelie Beebe, Mary Ellen Strong, Annie E. Gracie, and Mary Crubin, heirs of said Don Joseph Valliere.

That to said second amended petition the said defend-
86 ant also filed a demurrer on the 5th day of June, 1876, alleging general and special grounds of objection to said claim and praying that the said claim be rejected, and the said amended petition dismissed with costs, as by the said petition, amended petition, and demurrer, reference being thereto had, will more fully appear.

Fourth. That the said cause came on to be heard before Hon. Arnold Krekel, judge of said district court, on the 18th day of September, 1876, upon the said second amended petition and the demurrer thereto, and the said judge having advised thereon, did, on the 4th day of February, 1878, make his final decree in favor of the defendant, and dismissing the bill of complaints, and declaring said grant invalid.

And these appellants are advised and insist that the said decree is erroneous, inasmuch as the same adjudges the said claim to be invalid and dismisses the said amended petition, whereas it should have adjudged the claim to be a valid one and have sustained the said petition and awarded to the plaintiffs the relief therein prayed for.

Wherefore the plaintiffs and appellants herein named appeal from the portion of said decree claimed by them to be erroneous as aforesaid, and from the whole thereof, and pray that the said decree of said district court, and the said petition, amended petitions,

demurrers, and the depositions and evidence filed with said
87 petition and amended petitions, and all the proceedings in said cause may be returned to the Supreme Court of the United States without delay, and that said Supreme Court will proceed to hear said cause anew, and that said decree may be reversed and a final decision rendered by said Supreme Court adjudging the said claim to be valid and granting to the plaintiffs and appellants

such other and further relief in the premises as may be meet and proper.

Dated February 4, 1878.

WM. H. DURYEA,
Attorney for Petitioners.

And the bond so filed is in words and figures following, to wit:

Know all men by these presents, that we, William H. Duryea, as principal, and H. W. Long, H. Clay Ewing, N. M. Lay, E. L. Edwards, and W. S. Pope, as sureties, are held and firmly bound unto the United States in the full and just sum of three hundred dollars, to be paid to the said United States, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this fourth day of February, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas, lately, at the September term, A. D. 1877, of
88 the District Court of the United States for the Western District of Missouri, in a suit depending in said court between Benjamin H. Scull and others, plaintiffs, and the United States, defendant, judgment was rendered against the said plaintiffs, and the said plaintiffs having obtained an appeal to reverse the judgment in the aforesaid suit, and a citation directed to the said United States, citing and admonishing it to be and appear at a Supreme Court of the United States to be held at Washington, on the second Monday of October, next:

Now, the condition of the above obligation is such, that if the said plaintiffs shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

WM. H. DURYEA. [SEAL.]
H. W. LONG. [SEAL.]
H. CLAY EWING. [SEAL.]
N. M. LAY. [SEAL.]
E. L. EDWARDS. [SEAL.]
W. S. POPE. [SEAL.]

Approved by
A. KREKEL, *Judge.*

89 UNITED STATES OF AMERICA,
WESTERN DISTRICT OF MISSOURI. } *ss.*

I, Louis Schmidt, Clerk of the District Court of the United States for the Western District of Missouri, do hereby certify that the foregoing is a true and complete transcript of the original papers and of all proceedings and entries of record in the cause, wherein Benjamin H. Scull and others are plaintiffs, and the United States are

defendants, as fully as the same remain on file and of record in said cause in this office.

In witness whereof I hereunto subscribe my name and affix the seal of said court at office in the city of Jefferson in said district, this — day of February, A. D. 1878.

[SEAL.] LOUIS SCHMIDT, *Clerk.*

(Endorsed on cover:) W. Missouri D. C. U. S. No. 1,063. Benjamin H. Scull et al., appellant, vs. The United States. Filed 29th March, 1878.

ARGUMENT ON BEHALF OF APPELLANTS.

SUPREME COURT OF THE UNITED STATES.

No. 1063.

BENJAMIN H. SCULL *et al.*,
Appellants,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

WM. H. DURYEA,
J. WARREN GREENE,
For Appellants.

Supreme Court of the United States.

BENJAMIN H. SCULL, et. al.,
Appellants,

vs.

THE UNITED STATES,
Respondent.

ARGUMENT ON BEHALF OF APPELLANTS.

Statement of Case.

This matter comes before the Supreme Court on appeal from the District Court of the United States for the Western District of Missouri.

It is an application on the part of the heirs of Don Joseph Valliere and William H. Duryea, a grantee of said heirs, made under the provisions of an act of Congress passed June 10th, 1872, (17 *Stat. at Large*, 378), entitled "An Act to extend the provisions of an act entitled 'An act for the final adjustment of private land claims in the States of Florida, Louisiana and Missouri, and for other purposes,'" reviving and extending the provisions of the act of Congress passed June 22, 1860, (12 *Stat. at Large*, 85), for an adjudication upon their rights concerning a grant of a large tract of land on the White River, in the States of Missouri and Arkansas, which grant was made to Don Joseph Valliere, by the Governor General of Louisiana, in the year 1793, and while that province was still a Spanish Colony.

The present appellants, the heirs of Valliere, and

William H. Duryea, their grantee of an undivided interest, presented their petition to the said District Court within the time limited by the Act of 1872 (*Printed Record, pp.* 1, 2), which petition was twice amended by leave of the District Court. (*Printed Record, p.* 13 *and p.* 28.)

The second amended petition set forth the said grant, that it was a valid and *complete* one, and vested an absolute title to the lands therein described in the grantee and his heirs forever; that Valliere died intestate in the year 1799, seised of all the said lands, which thereupon descended to his heirs; that the United States has disposed of the greater part, if not all, of the said lands, and that the petitioners are the lawful descendants and heirs of Valliere, and prayed that the said grant be adjudged valid, and the petitioners declared entitled to a patent for such of said lands as have not been disposed of by the United States, and an equal quantity of the public lands of the United States for such as have been disposed of.

With this petition and forming part of it were filed, according to the requirements of section 11 and section 1 of the act of 1860, the following documents and evidence:

(1.) A certified copy of the survey and plat mentioned in the petition (*Printed Record p.* 41 *translation at p.* 42).

(2.) An exemplified copy of the final grant mentioned in the petition (*Printed Record p.* 43, *translation at p.* 54).

(3.) A sworn statement showing the lands supposed to be covered by the grant according to the legal divisions and subdivisions of the surveys made by the United States and consisting of

(*a.*) An affidavit of William H. Duryea, one of the claimants (Record, p. 37).

(*b.*) A letter from the Commissioner of the General Land Office at Washington accompanied

by Map Exhibit F and dated January 22, 1876 (*Record, p.* 38.)

(*c.*) A letter from said Commissioner dated February 22, 1876 (*Record, p.* 38).

(4.) Deposition of Creed Taylor as to the lawful descent of the claimants from Valliere and as to his death and intestacy (*Record, pp.* 25–27).

The United States demurred to the original petition, and to each of the amended petitions. The alleged grounds of demurrer to the second amended petition are as follows: (*Record, pp.* 45, 46).

First. Said amended petition does not state sufficient facts under the acts of Congress referred to therein to warrant the relief sought.

Second. Said amended petition does not contain an abstract of the title of the claimants.

Third. This Court has no jurisdiction of this case as to petitioners, James S. Scull, Cornelia Scull, Mildred Scull, Fannie Scull, J. H. Jenkins, T. A. Hinton, Elizabeth Hinton, Mary Frances Hunter, Sarah Jane Valliere, Peter Mitchell, E. D. Trietts, Louisa Trietts, Melina C. Roth, Augustus Vaugine, La Fayette Vaugine, Francis Vaugine, Mary Ellen Vaugine, Amelia Beebe, Mary Ellen Strong, and Mary Cruben, they having become parties since June 10, 1875, and having been joined as petitioners by said amended petition without the leave of said Court.

Fourth. Said amended petition does not show that the lands claimed have been in possession of and cultivated by the original claimant or those holding title under him for a period less than twenty years.

Fifth. Said amended petition does not show that the tract of land claimed was ever separated from the mass of the public domain by actual survey.

Sixth. Said amended petition does not state facts which show that the land claimed was ever separated from the mass of the public domain by definition of fixed natural and ascertainable boundaries or initial points, courses, and distances by the competent authority prior to the cession to the United States of the territory in which the lands claimed were included, but plaintiffs make that averment as a conclusion of law from their title papers set out by them in their said amended petition.

Seventh. Said amended petition does not show that the said lands are claimed by complete grant or concession or order of survey duly executed.

Eighth. The said grant of the said Baron de Carondelet to said Valliere, dated December 22, 1793, is void on account of the uncertainty and vagueness of the description contained therein.

Ninth. Said amended petition states facts which show that the said grant has long since been abandoned, because it is not alleged in said petition that said claim does not come within the purview of the 3rd section of the act of 1860, approved June 22d, 1860; nor are any facts alleged in said petition to show that the said claim does not come within the purview of said third section of said act.

Tenth. By virtue of the law of the land, and of the provisions of the several acts of Congress applicable to the case, plaintiffs are not entitled to any relief in the premises.

The first, eighth and tenth of these grounds of demurrer involve the whole merits of the claim as set forth in the second amended petition, and the documents and evidence filed with it, and present for adjudication the questions of the validity of the claim and of the rights of the petitioners under it.

The other grounds of the demurrer relate to matters of *form*, and raise the question as to whether the proceedings of the petitioners are defective in any of the particulars specified.

The cause came on for a hearing before the District Court upon the second amended petition, the documents and evidence filed with and forming part of it, and the demurrer of the United States thereto.

Upon a consideration of the whole case as thus presented, the District Court, on the 4th day of February, 1878, made a final decree (*Record, pp.* 56, 57), whereby it declared and adjudged the grant in question invalid and dismissed the petition. No opinion was given by the Court and no grounds assigned for its decision, but it is evident from the form of the judgment, which declares and adjudges *the grant itself invalid* that no weight was given to those grounds of demurrer which specify objections to *form* alone, and that only those involving the *merits* of the claim were considered in passing judgment. From this decree the present appellants appealed to this Court (*Record, pp.* 58, 59), their appeal was duly allowed and a transcript of the record together with *all the original* papers and evidence in the case, including the maps and plats ordered to be sent up to the October (1878) Term of this Court (*Record, p.* 57), The original papers and evidence have been sent up pursuant to this order, and are now on file in the office of the Clerk of this Court as part of the record in this case.

The appellants filed a bond, as directed by the District Court, which was duly approved (*Record, p.* 60), and a citation was duly issued to and served upon the United States (*Record, p.* 1) to appear and answer the said appeal.

No defects of *form* in the said amended petition, or the proceedings of the petitioners in the Court below, were specially demurred to, except those specified in the foregoing demurrer of the United

States, therefore none others, if any there be, can be regarded in this Court.

U. S. Revised Statutes, § 954.

Neither were any objections to the admissibility of any of the "depositions, deeds, grants or other exhibits" filed by the petitioners with their petition, taken in the District Court, and none, therefore, can be taken in this Court.

Rule 13, *Supreme Court.*

Assignment of Errors.

1st. That the Court below sustained the demurrer of the United States to the second amended petition herein.

2d. That it adjudged and declared the grant mentioned in said petition invalid.

3d. That it dismissed said petition.

Whereas, The said Court should have overruled the demurrer, adjudged and declared the said grant and the claim of the petitioners valid, and directed that for so much of the land comprehended within the limits of said grant as has not been disposed of by the United States, a patent issue to such of the petitioners as are shown to be the heirs of Don Joseph Valliere, and their grantee, William H. Duryea, and that for so much of the land as has been so disposed of the said petitioners receive land scrip or warrants for an equal quantity of public lands of the United States, pursuant to Section six of said act of 1860.

Argument.

It may be stated preliminarily that the disposition to be made of this case cannot be in any way affected by the *magnitude* of the claim.

The act embraces *all* claims, large as well as small, and it is in no manner indicated that the amount of land covered by any claim is to be considered, in passing upon its merits, *according to "the principles of justice and equity."*

This point has been directly presented to and passed upon by this Court in several cases, and may he considered as now finally and conclusively settled. Mr. Justice Baldwin, who delivered the opinion of the Court in

United States vs. Arredondo, 6 *Pet.*, 719, says: "The selection of this tribunal for a final and con- "clusive adjudication on the large claims affords "neither an indication of the intention of Congress "or furnishes us any reason that in the exercise of "that jurisdiction we should consider that the 'prin- "'ciples of justice,' 'the rules of a court of equity,' "'the law of nations,' 'of treaties,' 'of Congress' "or 'of Spain,' 'the rules of evidence' or 'the "'principles of law' can be at all affected by the "*magnitude* of the claim under consideration. "*The laws which confer the authority and point to "the guides for its exercise make no such discrim- "ination, and every 'principle of justice' forbids "it.*"

In that case a claim for some three hundred thousand acres of land was adjudged valid under the provisions of an act similar to the one now under consideration.

In the case of *Mitchell* vs. *United States* (9 *Pet.*, 711), a grant by a Spanish Governor of a million and a quarter of acres was adjudged valid; and in the case of *United States* vs. *Sutherland* (19 *How.*, 364), Mr. Justice Grier says:

"In construing grants of land in California, made "under the Spanish or Mexican authorities, we "must take into view the state of the country and "the policy of the government. * * * * * "Since this country has become a part of the Unit- "ed States these extensive rancho grants *which then*

"*had little value*, have now become very large and "very valuable estates. They have been denounced "as *enormous monopolies, princedoms, etc.*, and "this Court have been urged to deny to the grantee "what it is assumed the former government have "too liberally and lavishly granted. This rhetoric "might have a just influence, when urged to those "who have a right to give or refuse. *But the Unit-* "*ed States have bound themselves by a treaty to ac-* "*knowledge and protect all bona fide* titles granted "by the previous government; and this Court have "no discretion to enlarge or curtail such grants to suit "our own sense of propriety or defeat just claims, "however extensive, by stringent technical rules of "construction to which they were not originally "subjected."

So far as the other questions involved in this case are concerned, it must be borne in mind that the District Judge, in deciding the claim to be invalid, *handed down no opinion, and gave no reasons* for such decision. The appellants are therefore ignorant of the grounds of rejection, and this must be the excuse for examining in detail and with perhaps more minuteness than would otherwise be thought necessary, every possible point of objection to the petioners' claim.

The United States having demurred to the second amended petition, admits all the *facts* alleged in that, and in the documents and evidence filed with and made a part of the petition as required by section one of the act of 1860, and presents to this Court, for its decision only the questions of law raised by the demurrer. These may be conveniently arranged under the following heads:

First. The validity of the grant.
(*a.*) Its genuineness.
(*b.*) The authority of the grantor to make it.
(*c.*) The certainty of the description contained in it.

Second. The rights of the appellants under the grant and under the Acts of 1860 and 1872.

(*a.*) The rights of the heirs of the original grantee.

(*b.*) These rights as affected by the treaties of cession from Spain to France and from France to the United States.

(*c.*) By the subsequent legislation of Congress.

(*d.*) By any acts or omissions of the appellants or their ancestors.

(*e.*) The application of the Acts of 1860 and 1872 to this claim.

Third. The presentation of this claim to the District Court, and whether the directions of the Acts of 1860 and 1872 have been complied with in that behalf.

Fourth. The judgment to be prononnced by the Supreme Court.

(*a.*) Its finality.

(*b.*) Its extent and effect.

Fifth. The rights of persons not parties to this proceeding to participate in the results of a favorable judgment.

First.

As to the validity of the grant.

(*a.*) *Its genuineness.* It is alleged in the second amended petition (*Record, p.* 29), that in the month of June, 1793, Baron Carondelet, Governor-General of the then Spanish province of Louisiana, upon the petition of Don Joseph Valliere, a resident of said province, made and delivered to Don Carlos Trudeau, Surveyor-General of the province, an order to survey for the benefit of said Valliere a tract of land situated on each side of the White River, and within the limits of the present States of Ar-

kansas and Missouri. The order of survey is as follows (*Rec.*, *p.* 30):

"11th June, 1793. To Captain Don Joseph Val-
" liere, in the District of Arkansas, a tract of land
" situated on the White River, extending from the
" rivers Norte Grande and Cibolas to the source of
" the White River, ten leagues in depth.

BARON DE CARONDELET."

That Trudeau, in pursuance of this order, surveyed, and on or about the 24th day of October, 1793, signed and delivered the following certificate, (*Rec.*, *pp.* 30 & 42), which is accompanied by a plat, a copy of which is at pages 36 and 41 of the printed Record.

"Don Carlos Trudeau, Royal and Private Surveyor of the Province of Louisiana:

"I certify having measured in favor and in pres-
"ence of Don Joseph Valliere, captain of the station-
"ary regiment of Louisiana, a portion of land
"situated in the jurisdiction of Arkansas, on the
"north and south banks of Rio Blanco; bounded on
"the east or on the inferior limit by the Rio Norte
"Grande, the Rio Blanco and the Rio Cibolas; on
"the west or superior limit by the fountain head or
"origin of the most western branch of the said Rio
"Blanco, and by vacant lands of His Majesty,
"separated from said vacant lands by a line begin-
"ning at the said fountain head of the most western
"branch of Rio Blanco, running southwest ten
"leagues in depth; on the north by lands of His
"Majesty, separated from these by a drawn line be-
"ginning at the Rio Norte Grande, commencing at
"a point ten leagues distant, in a direct line from
"its mouth or confluence with the Rio Blanco, run-
"ning in a course nearly west, until it meets the
"fountain head or origin of the most western branch
"of the Rio Blanco; and on the south side by vacant
"lands of His Majesty, separated from these

"by a line drawn apart, beginning at a "point where ends the southwest limit, ten "leagues from the fountain head or origin of the "most western branch of the Rio Blanco, running "on a parallel line with Rio Blanco, descending, ten "leagues in depth, until it meets Rio Cibolas at a "distance of ten leagues in a direct line from Rio "Blanco; all of which is now fully demonstrated in "the figurative plan which precedes, in which are "shown the dimensions and courses of the bounda- "ries, the trees and boundaries serving as natural " and artificial boundaries. The lines and limits "have been made at the *request of the grantee, and* "*in compliance with the order of the Governor Gen-* "*eral* Baron de Carondelet, of the of June of the "present year.

"All of which I certify, that it may be every- "where valid. I give these presents together with "the figurative plan which precedes on the 24th of "October, 1793.

"CARLOS TRUDEAU,

"Surveyor General."

That on the 22nd day of December, 1793, Governor Carondelet made to Valliere a final grant of the land, by an instrument in writing under his hand as follows (*Rec., p.* 31).

"Don Francisco Baron de Carondelet, &c., &c.

"For the benefit of the public, and for the great- "er encouragement of agriculture and industry of "the country, I have judged it expedient to take "steps for surveying and granting the royal lands "of the province.

"Therefore I grant to Don Joseph Valliere, cap- "tain of the regiment stationed in Louisiana, a "portion of land in the jurisdiction of Arkansas, "situate on both banks of the Rio Blanco, ten "leagues on both banks, beginning at the origin of "the most western branch or source of the Rio "Blanco and running southwest ten leagues; de-

" scending from thence on the south by parallel " line with the Rio Blanco at the distance of ten " leagues, until it intersects Rio Cibolas at a point " ten leagues in a direct line with Rio Blanco, from " thence descending Rio Cibolas to its confluence " with Rio Blanco ; following this as far as the " mouth of Rio Norte Grande up the same to a " point ten leagues in a direct line from its mouth, " from thence ascending Rio Blanco to the north in " a westerly direction ten leagues from the same as " far as its source, which will be better seen on the " figurative plan *made by my order* by the Survey- " or-General, Don Carlos Trudeau, of this province, " 24th of October last, (it being impossible for the " royal surveyor to make an actual survey at this " time) and *in virtue of my order* in June of the " current year, by which I made him a grant and " ordered the Surveyor-General to put him in pos- " session according to the usual form.

" In consequence *of the power which has been* " *conferred on me by our lord the King* (whom God " preserve) *I grant in his royal name* to said Don " Joseph Valliere, captain of the regiment of infan- " try of Louisiana, the said portion described above, " *in order that he may dispose of it, he and his* " *legitimate successors as property belonging to him.*

" Done in New Orleans, 22d December, 1793.

" EL BARON DE CARONDELET."

All the above facts are not only admitted by the United States, but are also established by the certified copy of the above certificate of survey. (*Rec.*, *p.* 41, *translation at p.* 42), and by the exemplified copy of the final grant of Carondelet, authenticated by the United States Consul General at Havana (*Rec.*, *pp.* 43, 44, *translation at pp.* 54, 55, 56).

No question therefore can arise as to the *genuineness* of this grant to Valliere.

(*b.*) *The authority of the grantor to make it.*

It is alleged as a matter of fact in Subdivision

II of the second amended petition (*Rec., p.* 29), that Baron Carondelet, at the time of making this grant, was the Governor-General of Louisiana, and had full power and authority vested in him by the King of Spain to grant and confirm titles to land in the province of Louisiana, and to execute and deliver the *grant in question*; this is of course admitted, and the authority of the Governor-General to make such a grant as this is also well settled and has been recognized by numerous decisions of this Court.

United States vs. Arredondo, 6 *Pet.*, 691.
Delassus vs. United States, 9 *Pet.*, 117.
United States vs. Clark, 8 *Pet.*, 436.
Menard vs. Massey, 8 *How.*, 293.
United States vs. Percheman, 7 *Pet.*, 54.
United States vs. Hanson, 16 *Pet.*, 196.
Glenn vs. United States, 13 *How.*, 250.

In *Delassus* vs. *U. S.*, (*supra,*) Chief Justice Marshall says: "The Governors General, by virtue of "the Royal order of 1774 had power to grant, and "it is not to be presumed that they exceeded their "authority as to quantity—*he who alleges that an "officer entrusted with an important duty has vio-"lated it, must show it.*" And in *Hansom's case* "(*supra*), the Court says: "The authorities of Spain "were authorized to grant the public domain in ac-"cordance with their own ideas of the merits, and "the power of the Supreme Court extends only to "the inquiry *whether in fact the grant has been made* " * * * * * and unless it is on some condition "its effect *must be construed by its own terms.*"

It is also alleged in subdivision VI. of said petition (*Record, p.* 32), that by the execution and delivery of the grant and survey above mentioned said Valliere became vested absolutely with the title to the lands described therein, and that the same became his private property, to hold to himself, his heirs and assigns forever. This is substantially an allegation that, *as a matter of fact*, under the Spanish law, a grant in the terms above set forth creates a fee simple in the grantee. This, too, is the natural interpretation

of the words of the grant itself, and they are a sufficient answer to the seventh ground of demurrer. The grant purports on its face to convey an absolute and *complete* title without reservation or condition of any kind to Valliere "*in order that he* "*may dispose of it, he and his legitimate successors,* "*as property belonging to him.*"

The grants in *Castant's case*, 12 *How.*, 437, *Arredondo's case*, 6 *Pet.*, 719, *and Reyne's case*, 9 *How.*, 127, are substantially the same in form as this one, and were held to be *complete* grants.

(*c.*) *The certainty of the description.*

It is urged in the eighth ground of demurrer that the description of the land granted is so vague and uncertain that the grant is *void* for that reason.

The preliminary *order of survey* (*Rec.*, *p.* 30) designates generally "A tract of land situated on "the White River, extending from the rivers Norte "Grande and Cibolos to the source of the White "River, ten leagues in depth."

It is alleged in paragraph XIII. of the second amended petition (*Rec.*, *p.* 33), and admitted by the United States, that the Rio Norte Grande is the Great North Fork River of Arkansas, a branch of White River; that the Rio Cibolos is the Buffalo River, also a branch of the White River; and that the Rio Blanco is the White River of the States of Arkansas and Missouri.

The Surveyor-General, in his return to this order, certifies (*Rec.*, *p.* 30) that he has measured "in favor "and in *presence of* Don Joseph Valliere, a portion "of land situated in the jurisdiction of Arkansas, "*on the north and south banks of Rio Blanco,* "*bounded on the east or on the inferior limit by* "*Rio Norte Grande, the Rio Blanco and the Rio* "*Cibolos, on the west or superior limit by the foun-* "*tain head or origin of the most western branch of* "*the said Rio Blanco and by vacant lands of His* "*Majesty.*"

Having thus designated the upper and lower limits of the tract by fixed natural and ascertainable boundaries, he proceeds to run the courses so as to give ten leagues in breadth on each side of the river between these two boundaries. He also annexes a figurative plan, showing what he conceives to be the general outline of the tract (*Rec.*, *p.* 41.)

Upon this certificate of survey, and in pursuance of the preliminary order, Carondelet executed to Valliere a final grant (*Rec.*, *p.* 31) of "*a portion of* "*land in the jurisdiction of Arkansas, situate on* "*both banks of the White River, ten leagues on* "*both banks.*" Here follows a description of the courses and distances, substantially the same as that given by Trudeau, beginning at the source of the most western branch of White River and running to the Norte Grande on one side and to the Cibolos on the other side, and taking in a strip of land ten leagues in breadth on each side of the White River, "*which will be better seen on the* "*figurative plan made by my order by the Surveyor* "*General, Don Carlos Trudeau, of this province, 24th October last.*"

It is clear upon the face of these documents that it was the *intention* of Trudeau to designate, and of Carondelet to convey, ten leagues of land on each side of the White River, running from its most western source to the Great North Fork and the Buffalo Rivers, and according to the diagram of Trudeau showing the origin and course of White River as he supposed them to be, this intention is perfectly carried out *in the description contained in the grant,* To Carondelet, or Trudeau, or Valliere there was nothing vague or uncertain in this description ; the land conveyed was perfectly well defined.

But it will be seen upon a comparison of Trudeau's plat with the Map Exhibit F, on which is marked the *true* source of the White River, as ascertained by later and more accurate surveys made by the United States, that Trudeau mistook the po-

sition of the source of White River, placing it at a point in what is now the State of Kansas, whereas it actually is at a point in what is now the State of Arkansas, about one hundred and fifty miles to the southeast of the position assigned by Trudeau. It will also be observed that the course of White River from its source to the other rivers designated is materially different from that laid down in Trudeau's plat. This change in the location of the source, and the course of White River would necessarily make it impossible to run the courses in exactly the same manner as indicated in the grant, and *for this reason* it is objected by the United States that the "*grant "is void*, on account of the vagueness and uncer- "tainty of the description contained therein."

This plat and process verbal of Trudeau's, were undoubtedly made, not from an actual survey of the whole tract granted, but from existing maps of the country and Trudeau's general knowledge and information in regard to the situation and course of the rivers mentioned; this was perfectly well understood by Carondelet for he states parenthetically in the final grant (*Record, p.* 55), ("it "being impossible for the royal surveyor to make "an actual survey at this time"). Nor was an actual survey necessary either to make the grant valid or to designate the property.

Where the grant sufficiently described the land, there was no need of a survey under the Spanish law.

Villalabos vs. *United States*, 10 *How.*, 541.
Arredondo's case, 13 *Pet.*, 133.
Buycks' case, 15 *Pet.*, 224.
United States vs. *Seton*, 10 *Pet.*, 309.

Can this objection on the part of the United States be considered as of any weight?

The uniform policy of the law in the construction of deeds is that they shall so be construed as to

stand rather than fall; so far as the description is concerned, it is presumed that the grantor intended to convey *something*, and if the description is faulty or vague so that it does not precisely indicate the property, other circumstances tending to explain what was intended to be conveyed are resorted to, nor is a grant ever declared *void* for this reason alone, unless it is impossible to designate any property whatever after an examination of the whole deed and such extraneous circumstances as may throw light upon it.

This principle is elementary and has been recognized and acted upon in many cases of Spanish land claims where the objection of vagueness and uncertainty might have been and was taken with very good reason.

United States vs. Fossat, 2 *Wall*, 649.
Suttor's case, 2 *Wall*, 562.
Rodigues vs. United States, 1 *Wall*, 582.
Hqueras vs. United States, 5 *Wall*, 828.
Arredondo vs. United States, 6 *Pet.*, 719.

Where the natural objects are not correctly delineated they should be altered to conform to the fact.

United States vs. Ried, *Hoffman's Reports* (*Land Cases*), 129.
Chabolla vs. United States, *id.*, 130.

Applying this principle to the present case—when it appears that the courses in Carondelet's grant cannot be run exactly as stated by him, when it appears from the grant itself that Carondelet's description is based upon Trudeau's plat and survey, when it appears, that Trudeau was mistaken in regard to the source and direction of the White River, and that it is not correctly delineated by him, and when it further appears perfectly clearly and distinctly, from the order of survey, certificate of survey, plat and

final grant that it was the *intention* of Carondelet to describe and grant, and that he did grant to Valliere and, according to his information and knowledge, describe ten leagues on each side of the White River from its source to the Great North Fork and Buffalo River, there can be no question but that the grant should stand as valid and that the erroneous description should be corrected by making it conform to the *actual* location of the boundaries of the land intended to be granted.

There can be no injustice to the United States in adopting this course, for the *quantity* of land intended to be granted is not mentioned by Carondelet, nor is its location with respect to anything except the White River and the other rivers referred to, nor was either of these facts a controlling element in the grant. It was intended that *wherever* the source of the most western branch of the White River might be, and whatever might be its *distance* from the North Fork and the Buffalo Rivers, Valliere should have just as much land as might be contained in a strip ten leagues wide on each side of the river from its source to its confluence with the rivers designated.

An analysis of Trudeau's plat will show that a larger quantity of land was indicated by him than is comprehended within the actual limits of the grant. If we consider the *first* course on said plat, which runs from the supposed source of the White River "*in a southwesterly direction, ten leagues,*" as representing a scale of ten Spanish leagues, or thirty-seven and seven-eighths English miles, which is stated [*Rec., pp. 37 and 40*] and admitted to be the English equivalent, the source of the White River, as indicated on said plat, would lie fifty-two and a half Spanish leagues, or two hundred and eight English miles west of the meridian of the confluence of White River with the Great North Fork, and nearly twenty Spanish leagues, or about seventy-five English miles north of the parallel of latitude of the said confluence, this, as will be seen by laying off

these distances on the Map Exhibit F. would locate the source of White River at a point in the State of Kansas some eighty-three miles west of the Missouri State line and some fifty-four miles north of the line corresponding with the boundary between the States of Arkansas and Missouri.

The area comprehended within the boundaries as they were thus supposed by Carondelet and Trudeau to exist, would be vastly greater than that lying within the actual boundaries as they are now ascertained and indicated on Map Ex. G.

Upon all the foregoing considerations, it is claimed that the grant in question.

(*a.*) Is genuine.

(*b.*) Was made by a person duly authorized and having full power to make it, and

(*c.*) Conveys a definite and ascertainable tract.

It necessarily follows that it was valid at the time it was made, that it separated the lands described therein from the public domain, and vested, as appears from its terms, a complete and full title to them in Valliere.

Second.

The rights of the appellants under this grant, and under the acts of 1860 and 1872.

(*a.*) *The rights of Valliere's heirs.*

It is alleged in paragraph VII of the second amended petition (Rec., p. 32), that Don Joseph Valliere died intestate, in the City of New Orleans in the year 1799, seized of this tract of land, and that it thereupon descended to his heirs.

The Law of Spain on this point, is laid down in 2 *White's New Recopilacion*, p.* 99, as follows:

"Those *things* which the King gives to anyone,

---

*The edition referred to in this argument is that of 1839.

"cannot be taken from him, either by the King or "any one else, without some fault of his, and he to "whom they are given shall dispose of them at his "will as of any other things belonging to him, *and* "*in case of his dying intestate it shall descend to* "*his heirs.*"

The word *things*, in the above quotation, does not mean *chattels*, but is used in contradistinction to *persons*.

1 *White's New Recop., p.* 70.

It is also alleged in said petition, paragraph XI (*Rec., p.* 33), that the appellants are "the lawful de- "scendants and surviving heirs of said Don Joseph "Valliere, and the grantee of the heirs of said Val- "liere."

The testimony of Creed Taylor also substantiates the fact of the death of Valliere, intestate, as alleged in the petition, (*Rec., p.* 25,) and the lawful descent of these appellants from him. (*Rec., pp.* 25, 26.)

(*b.*) *The rights of Valliere's heirs as affected by the treaties of cession.*

In the year 1800, by the treaty of St. Ildefonso, the province of Louisiana was ceded by Spain to France, and in the year 1803, immediately after she took formal possession of the province, France, by the treaty of Paris, ceded it to the United States.

The King of Spain, in the royal dispatch directing the delivery of Louisiana to France, in 1802 (2 *White's New Recop., pp.* 191–2), says: "We hope "* * * * and we promise ourselves, from the "sincere amity and close alliance which unite us to "the government of the Republic (French), that "said government will issue orders that *all grants* "*of land, of whatever denomination, made by my* "*Governors, may be confirmed, although not con-* "*firmed by myself.*"

This was a very plain indication of the royal pleasure on this point, and ought undoubtedly to have been observed by any government succeeding to the jurisdiction over the province.

The treaty of cession by France to the United States, article 2, (2 White's new Recopilacion, p. 208) especially excepts "*private property*" from the conveyance to the United States.

Neither of these treaties therefore affected in any way the right and title of Valliere's heirs under the grant in question, except to *guarantee* those rights. There is no suggestion that the grant was ever annulled by Spain or by France, or that Valliere's heirs disposed of any part of the land after his death.

This grant was consequently at the time of the cession of Louisiana to the United States, a valid and subsisting one, and the title, both legal and equitable, was in the heirs of Valliere.

This is an important fact, for, *so far as the United States is concerned*, whatever rights Valliere's representatives had at that time, they continued to have, even in the absence of any remedy for their enforcement, and have at the present time, UNLESS their rights have been, since the cession of Louisiana, in some manner legally extinguished.

The United States was bound by the treaty of cession, and by every principle of justice and equity, to confirm and complete all incomplete grants made by the authorities of Spain, which Spain or France would have confirmed and completed, had the cession not been made, and to confirm and protect all complete grants which Spain or France, at the time of the cession, recognized as valid.

(*c.*) *The rights of Valliere's heirs as affected by the legislation of Congress subsequent to the treaty of cession.*

The claim in question comes within the category of *complete* grants, as has already been seen, and the duty of the United States in regard to it was obvious.

How has this duty been performed?

In the first place Congress passed the *Act of March 26th*, 1804, entitled an "Act erecting Louisiana into "two territories and providing for the temporary

"government thereof" (2 *Stat. at Large*, 283) by the fourteenth section of which "any citizen of the United States, *or other person*," was forbidden, under the penalty of fine and imprisonment, and of being summarily ejected by the United States troops, to make or to attempt to make any settlement or survey, or to designate boundaries in any manner, "on any lands belonging to the United States within "the limits of Louisiana." This law, as has been decided by the Supreme Court, effectually prevented Valliere's heirs, unless they had actually settled upon and occupied the whole of this vast tract, from making any attempt whatever to assert their title to these lands except in such manner as Congress might thereafter direct or allow.

Glenn's case, 13 *How.*, 260.

And that they were not actual occupants sufficiently appears from the fact that the United States assumed the proprietorship of the land covered by this grant, surveyed it as part of its public domain, and has disposed of the whole or the greater part of it. Second Amended petition, paragraphs, VIII and IX (*Rec.*, *pp.* 32, 33). This is admitted by the demurrer, and is also shown by the two letters of the Land Commissioner and the map, Exhibit F, furnished by him (*Rec.*, *pp.* 38, 39), and also by the affidavit of George H. Day and the accompanying map Exhibit G (*Rec.*, *pp.* 39, 40), from all of which it appears that the whole area of this grant was surveyed by the United States and mapped out and distributed into townships, and ranges, and sections as part of its public domain.

In the second place, Congress never, until the year 1860, when by an act of tardy justice, the statute under which this claim is now brought was passed, afforded any opportunity or made it in any way possible for the heirs of Valliere to regain their lost inheritance or obtain any compensation for it. Until the year 1860, no act was ever passed for the recognition or confirmation or adjudication of *complete* grants of land situated in what is now Missouri

or Arkansas, and containing a larger quantity than one league square; although *incomplete* grants for a much larger quantity have been confirmed under the provisions of certain acts of Congress, and in the State of *Florida* complete grants of thirty, forty, three hundred thousand and a million and a quarter of acres recognized and adjudged valid, under an act similar in its provisions to the act of 1860, but relating only to land in that State.

Arredondo's case, 6 *Pet.*, 691.
Mitchell vs. *U. S.*, 15 *Pet.*, 88.
U. S. vs. *Richards*, 8 *Pet.*, 470.

No laches, therefore, is to be imputed to these appellants in *presenting* this claim, and so far as the time of its presentation is concerned, its merits should be decided upon in the same manner as if it had been presented under a similar act, (had Congress passed such an one,) immediately after the cession of Louisiana to the United States.

If at that time no actual possession or occupancy was necessary to make the title of Valliere's heirs a valid one, it cannot be rendered invalid by their failure to occupy since that time, for, apart from other considerations which will be noticed hereafter, the act of 1804 forbade them to make any attempt to do this.

The question occurs, did the United States, upon assuming the proprietorship of these lands, or at anytime afterward, take any steps for the legal extinguishment of the rights of Valliere's heirs. None certainly, in the judicial tribunals of the United States, and it is respectfully submitted that no act of Congress could properly operate retrospectively to divest their rights, solemnly guaranteed under the treaty and by the law; nor *has* Congress passed any law which purports to do this.

The legislation on the subject of land grants, so far as it has any relation to the Province of Louisiana, out of which the States of Missouri and Arkansas were formed, is as follows:

relating to the territory of Missouri, allows, "until "the 1st day of December next" to file such notices and evidences of claims, and prescribes the same formality as the act last above cited. Complete grants were therefore not affected by this act.

The act of March 3, 1813, (2 *Stat. at Large*, 812) relating to the territory of Missouri, contains the same provision and does not affect complete titles.

The acts of May 26, 1824 (4 *Stat. at Large*, 52) and of May 24, 1828 (4 *Stat. at Large*, 298) relate exclusively to *incomplete titles*, as do also the acts of July 9, 1832 (4 *Stat. at Large*, 565), March 2, 1833, (4 *Stat. at Large*, 661), and June 17, 1844 (5 *Stat. at Large*, 676), reviving the act of 1824.

United States vs. *Castant*, 14 *How.*, 437.
United States vs. *Reynes*, 9 *How.*, 127.
United States vs. *D'Auterive*, 10 *How.*, 609.

Since the act of 1844, no act relating to the confirmation or recognition of Spanish grants in the territory in which this grant lies, was passed until 1860, which is the act under which (as revived and extended by the act of 1872) this proceeding is taken.

It will be seen from this review of the legislation of Congress on the subject, that no act applicable to land lying in Missouri or Arkansas has ever been passed, by the provisions of which this claim can possibly be affected; and the only provisions ever made by Congress in regard to complete grants for *more than a square league* of land in Missouri and Arkansas prior to 1860, are contained in the first five of the acts above mentioned which *permitted* the claimants "*to file their claims*" and the evidence in regard to them, but which made no provision for any further action.

It does not appear in this case that these claimants or their ancestors either did or did not take advantage of this permission, but whether they did or did not their position could not have been altered,

they would still be as they are now, divested of their land and petitioners for reimbursement from the United States.

(*d.*) *The rights of Valliere's heirs as affected by their own acts or omissions.*

It is suggested in the ninth ground of demurrer (*Rec., p.* 46) that the petition states facts which show *that this grant has long since been abandoned.*

This is utterly without foundation. No fact is stated in the petition which can in any manner be construed as evidence of a voluntary abandonment by Valliere or his heirs, and the evidence of Creed Taylor filed with said petition expressly negatives this assumption. (*Rec., p.* 27).

In the case of a complete legal title to land there must be, in order to constitute an abandonment, some *affirmative* act on the part of the owner showing an actual *intention* to abandon. It cannot be presumed from a mere neglect to occupy or to take possession, or to assert title, however long continued.

Landes vs. *Perkins*, 12 *Mo.*, 238.
Ferris vs. *Coover*, 10 *Cal.*, 589.
Pickett vs. *Dowdale*, 2 *Wash.* (*Va.*), 106.
Bunting vs. *Young*, 5 *Watts and S.* (*Pa.*), 180.
Urket vs. *Coryell*, *idem.*, 60.
Philadelphia vs. *Riddle*, 25 *Pa. St.*, 259.
Davis vs. *Keefer*, 4 *Binn. Pa.*, 165.

One who has a complete title to land may leave it unoccupied and fail to assert his title in any way and for any length of time; his *title* is in no way affected nor his right to enter again into possession; *unless* some other person has entered into possession and held the land adversely for the period prescribed by the Statute of Limitations; and even *then* the original owner may recover if the adverse possessor waives the bar of the Statute of Limitations and consents to restore the property upon the owner proving title.

In the case at bar the United States is the "adverse possessor"—no Statute of Limitations runs in her favor; her immunity from suit takes the place of that. If she says, after the lapse of one year or of a hundred years, "*any person* who claims these "lands may bring suit for them and if he shows that "he has valid and complete title derived from the "Spanish government, the lands shall be restored to "him and if any part of them have been sold or dis-"posed of by the United States he shall have com-"pensation in other lands," it would be the grossest injustice to say to one who should incur the expense of a suit on the faith of such a promise: "You must "be deemed to have abandoned your claim because "you have not urged it before, although this is the "first opportunity which has ever been given to "present it."

The United States, by consenting to be sued, has placed herself in the position of an individual in that respect and must be subject to the same rules.

Glenn vs. *United States*, 13 *How.*, 250.
Arredondo's case, 6 *Pet.*, 691.

This ground of demurrer was evidently suggested by various cases decided under the acts of 1824 and 1844.

United States *vs.* Hughes, 13 How., 1.
Same *vs.* same, id., 4.
United States *vs.* Boisdoré, 11 How., 63.
Vilemont *vs.* United States, 13 How., 261; and other similar cases,

where it was held that the fact that no possession or cultivation had been shown by the claimant, constituted a conclusive presumption that the claim had been abandoned. But it must be remembered that all these cases relate to inchoate and incomplete grants, where some act remains to be done or some condition to be performed before the grantee could receive the full and complete title to the land. The proprietorship of the land did not pass from the

Spanish government by the preliminary concession, the grantee's right *remained* inchoate until he had complied with whatever condition precedent was imposed and until he had obtained the final and complete grant from the government—his failure to occupy the land, which was usually the condition precedent, where one existed, or to take such other steps as were indicated in the preliminary concession, would naturally be considered by the Spanish government, or its successor, as conclusive evidence that he had abandoned, not his title, but his right to claim the *perfection of his title.* Not so, as in this case, when the final and complete grant was given by the Spanish government without any conditions annexed; then the entire ownership passed at once, finally and completely, from Spain to her grantee, and the land became his to use in whatever way he might choose, whether to occupy, to sell, to let, or to allow to remain idle. He was under no obligation to occupy it, and it continued his own until either he disposed of it or became ousted by an adverse possessor or active affirmative measures were taken by the government to forfeit it "*for some fault of his,*" for, as has been said above, the things given by the king could not be taken away, "either by the king or anyone else, except for the fault of him to whom they were given."

2 *White's New Recop.*, 99.

Our government, as the successor of Spain, was likewise bound to recognise as valid and to protect all grants of land, whether occupied or unoccupied, which Spain at the time of the cession so recognised. This is in accordance with the treaty stipulation, and has been frequently recognised as a principle of decision by this Court.

United States vs. Boisdoré, 11 *How.*, 63.

It seems clear, therefore, that these appellants, as the heirs of Valliere, have lost none of their *rights*, so far as the United States are concerned, under the

grant to their ancestor, either by their own acts, or by the acts of Spain, France or the United States; that these rights have existed, although no remedy for their enforcement or ascertainment was provided until the year 1860.

(e.) *The application of the Acts of* 1860 *and* 1872 *to this claim.*

The first section of the Act of 1860 provides that "*any person* or persons, and the *legal representa-* "*tives* of *any person* or persons who claim *any* "lands lying within the States of * * * *Missouri*, "by virtue of *any* grant * * * * emanating from "*any foreign government*, * * * * bearing "date prior to the cession of the territory out of "which said State was formed, * * * * * are "hereby authorized to make application for the con- "firmation of their title to the lands *so claimed.*"

The present appellants come directly within this permission.

In regard to the tribunal in which this application is to be made, the eleventh section provides that a suit in equity may be bought against the United States by such claimants in the District Court of the United States "within whose jurisdiction the lands, "*or any part of the lands*, claimed may lie," whenever the following conditions exist:

(1.) Where the lands claimed have *not* been in possession of and cultivation by the original claimant or those holding title under him, for a period of twenty years preceding the date of filing the petition, and

(2.) Where such lands are claimed by *complete grant* by the competent authority prior to the cession to the United States of the territory in which said lands were included.

It has already been shown that the second condition is fulfilled in this case, and paragraph XV of the second amended petition (*Rec.*, *p.* 34) shows that

the first condition also is fulfilled, for it is there alleged and is admitted by the demurrer, that the lands covered by this claim have not been possessed or cultivated by the orginal claimant—or those claiming under him for the period of twenty years prior to the filing of the petition;

The Act of 1872 simply revives the provisions of the Act of 1860, and adds a further provision for the benefit of those whose titles depend solely upon occupancy, and are not evidenced by writing.

There can be no doubt, then, of the rights of these petitioners to make application in the United States District Court for the Western District of Missouri, that being the District in which the lands claimed, *or some portion* of them, are situated (*Paragraph IX., Second Amended Petition, Rec., p.* 33), for the confirmation of their title to these lands, and upon their claim being decided valid, to have, as against the United States, the remedy provided in said act.

But it is objected in the fourth ground of demurrer, that the petitioners have no rights, because "the petition does not show that the lands claimed "have been in possession of, and cultivated by the "original claimant, or those holding title under "him, for a period of *less than twenty years.*"

The Acts of 1860 and 1872 do not require this, but merely that it should appear that the original claimant, or those holding title under him, *have not been in possession* for a period of twenty years; this allegation, as has been seen, is made in the petition.

Nor does the act anywhere require that lands claimed under its provisions should *ever* have been possessed or cultivated, but merely for convenience divides all valid claims to lands under its provisions into two classes (sec. 3):

(*a.*) Where the lands *have* been possessed and cultivated for a period of at least twenty years before filing the claim.

(*b.*) Where the lands have *not* been possessed and cultivated for a period of at least twenty years before such filing.

These two classes comprehend all claims to land which can possibly exist; for the second class, according to the plain sense of the words used, must comprehend all claims where the land has not been possessed and cultivated for at least twenty years; as well those where there *has* been possession and cultivation for *less* than twenty years, as those where there has *never* been any actual possession and cultivation whatever.

The claim of *Lynde's heirs*, which was adjudged valid by the Supreme Court of the United States (11 Wall, 632) was one where there had *never* been *any actual* possession or cultivation of the land claimed. (See Claim of John Lynde, Cosby's Register C. Claim 19 State Papers, Public Lands III. 54 Green's Edition.) Of course, if a claim is by virtue of a grant which would not have been considered valid by the *Spanish Government*, such as a conditional or an incomplete grant, the failure to take possession or to perform whatever other condition was annexed to the grant would be a good defence on the part of the United States, but it could not be a ground of *demurrer* in any case, unless it appeared conclusively on the face of the petition.

Third.

As to the form in which this claim has been presented.

It has been already shown that this claim rests upon a genuine and valid grant, that it is one of those mentioned in section eleven of the act of 1860, and that these appellants were the proper persons to claim the relief provided in the Acts of 1860 and 1872. It remains to be considered whether the claim has been presented in the manner and form prescribed by the act.

The requirements of the act are that the procedure in the District Court shall be by *petition*,

which *shall be verified* by the oath of the party, and to which the United States shall *be made defendant*. These requirements have all been complied with. It is to be observed that this act does not require nor allow any defendant except the United States, and differs in this respect from the acts of 1824 and 1844, which *expressly* required adverse claimants or occupants to be made parties defendant, and the decisions under the acts last mentioned dismissing petitions for the reason that adverse occupants and claimants were not joined, have no application to cases under the present act. It is further required that the petition shall "conform to the provisions of section one of this act, "and to the practice of such Court in Chancery."

In order to *conform to the provisions of section one*, the petitioners herein filed with their petition.

1. The "*evidence in support of their claim*," consisting of

(*a.*) A certified copy of the survey made by Trudeau (*translation at p. 42 Printed Record*), certified by the custodian of the Surveyor General's record at New Orleans, (*Record, p. 41*) which is made evidence by statute.

U. S. Rev. Stat., § 2,225.

(*b.*) A copy of the grant of Governor Carondelet to Valliere, certified by the proper authorities in Havana (at which place the original grant is on record), and authenticated by the United States Consul at that city (*Record, pp. 43, 44*).

This is the highest available evidence of the authenticity of this grant, for only copies of these grants were given to grantees, the *originals* remaining on record in the public archives.

Mitchell vs. *United States*, 9 *Pet.*, 725.
Perchman vs. *United States*, 7 *Pet.*, 51.

And certified copies are evidence in the Courts of the United States in these cases.

United States vs. *Breward*, 16 *Pet.*, 143.
United States vs. *Acosta*, 1 *How.*, 24.
United States vs. *Davenport*, 15 *How.*, 1.
United States vs. *Perchman*, 7 *Pet.*, *pp.* 84, 85.

The original of this grant is properly in the custody of the Spanish authorities in Havana. West Florida was subordinate to Louisiana (2 *White's New Recop.*, 397. See also grants made by Carondelet, *id.*, *pp.* 405, 408, 410, in which he styles himself Governor General of Louisiana and *West Florida*), and the Province of Louisiana and West Florida was subordinate in all military, political and other affairs to the Captain General of Cuba. Havana was the capital of the Spanish colonies in America, and was therefore a proper place in which to keep all the archives relating to colonial affairs.

2 *White's New Recop.*, 186, *side paging* 158.
Id., 362.

See also commissions of the various Governors General of Louisiana.

Id., 449–458.

The certification of the copy of the grant also shows upon its face that the original is found in the proper and lawful repository; this, too, is alleged as matter of fact in Paragraph V, Second Amended Petition (*Record*, *p.* 32), and no objection was taken in the Court below to the admissibility of the copy of the grant.

(*c.*).—The testimony of Creed Taylor, taken before a United States Commissioner upon notice to the United States and conformably to the practice of the District Court in Chancery, as to the direct and legitimate descent of these claimants from Don Joseph Valliere, and also as to his death and intestacy. (Rec pp 23-27)

2. An "*abstract of the title of the "Claimants.*" It is specially objected in the second paragraph of the demurrer to the second amended petition (*Rec., p.* 46) that the "petition does not *contain* " an abstract of the title of the claimants." But the act does not require the petition to *contain* such an abstract—at most it is only necessary that one should be on file with it, and as no conveyances have been made of this property by Valliere or his heirs, except an undivided interest to the appellant Duryea, the certified copy of the original grant (*Rec., p.* 43), and the testimony of Creed Taylor (*Rec., p.* 25), as to the descent of these claimants, constitute a complete abstract of title.

3. A "*copy of the plat of the survey,*" made by Trudeau (*Rec., p.* 41). This is a part of the certified copy of the certificate of survey.

4. A "*sworn statement by the claimant of the "lands supposed to be covered by the claim, ac- "cording to the legal divisions and subdivi- "sions of the survey made by the United States*" (*Rec., pp.* 37, 38, 39, 40).

5. The original order of survey, (*Rec., p.* 30), or a certified copy could not be filed, for the reason that it had been destroyed by fire, (*Rec., p.* 33); it is however admitted to have existed, as alleged by petitioners, and a copy is set forth in the second amended petition.

This completes all the requirements of section one and section eleven in regard to the *manner* of presenting claims, and although it is confidently believed that this Court would not reject a meritorious claim of this character upon simply technical grounds, ~~or because of mere formal grounds~~, or because of mere formal omission or mistake on the

part of the claimants in presenting their claim (*Lynd's case*, 11 *Wall.*, 632; *Villalobos' case*, 10 *How.*, 541). Yet it is respectfully submitted that the statute has been in this case strictly and exactly followed, and in such a manner that the proceedings of the petitioners would be considered regular, so far as formal matters are concerned, and the documents and evidence filed with the claim, admissible, even in the absence of the provisions of § 954, *United States Revised Statutes, and Supreme Court Rule* 13.

The remaining grounds of demurrer which have not been heretofore specially noticed, the *third*, *fifth*, *sixth*, *seventh* and *ninth*, may be disposed of in a few words.

1. The third alleged ground of demurrer (*Rec.*, *p.* 46), is that the Court "has no jurisdiction of this "case" as to certain of the petitioners named, "they having become parties *since June* 10, 1875, "and having been joined as petitioners *without the* "*leave of said Court.*"

The minutes of the District Court (*Rec.*, *p.* 28), show that the second amended petition—(one of the amendments being the addition of these very parties as co-petitioners)—*was* filed *by leave of the Court* upon a motion, on the hearing of which the United States was represented, and that thereupon upon motion *of the District Attorney* leave was given him to plead to said amended petition "*by May* 15, 1876."

It is true that the petitioners mentioned in this clause of the demurrer became parties *since June* 10*th*, 1875, that being the date on which the Act of June 10, 1872 expired, *but*, the original petition in this case was filed on the 19*th day of May*, 1875 (*Rec.*, *pp.* 1, 2), nearly a month before the act expired, and any amended petition thereafter properly filed would relate back to the time of the original filing.

U. S. vs. Delaspine 15 *Pet.*, 319.

The parties who have been added are heirs of Val-

liere and stand in the same position exactly in regard to this claim as the original parties to the petition, and whether brought in as parties or not, would be entitled to participate in any benefits resulting from the confirmation of this title.

2d.—The fifth and sixth grounds of demurrer (*Rec.*, *p.*46), which are substantially the same, are not well taken. The petition shows as matter of fact, that the land was granted to Valliere by conveyance from Carondelet, in which conveyance the limits of the grant are defined by fixed, natural and ascertainable boundaries; and by the execution and recording of this grant, the lands described were, in the eye of the law, actually severed from the public domain, and thenceforth became the private, individual property of Valliere, and he became *possessed* of them by virtue of the grant, for possession does not imply occupation or residence. One who has a perfect legal title is deemed to be in possession.

Arredondo's case, 6 *Pet.*, 691.
Mitchell's case, 9 *Pet.*, 735.
United States vs. *Boyd*, 5 *How.*, 10.

3d.—The ninth alleged ground of demurrer (*Rec.* p. 46) so far as it may be considered as raising the question of abandonment, has been fully considered above. Exactly what objection was intended to be founded upon it a as whole is not clear.

That the petition should "*state facts* which show "that the said grant has long since been abandoned, "*because* it is not alleged in said petition that the "claim *does not come within the purview of the* "*third section* of the act of 1860", or because "there "are no *facts* alleged in said petition to show that "the said claim does not come within the purview" of that section, is simply incomprehensible.

The third section contains nothing whatever with regard to the *abandonment of grants*, or what facts are to be considered as indicating an abandonment, but merely contains instructions to the *commission-*

ers mentioned in the first and second sections of the act, as to the manner of classifying and arranging claims which may be submitted to them for decision, and enumerates certain classes of cases which shall not be confirmed—namely those which have been already rejected by a former tribunal *for fraud*, and those which have been *twice* rejected on *their merits*.

The signification of the word "*purview*" in the connection in which it is used in the eleventh section is somewhat obscure. It cannot mean that a claim shall not be brought in the District Court if it is included in any one of *the three classes* mentioned in section three, for those classes comprehend *all* claims which come within the provisions of the act of 1860, and that construction would make it impossible to bring *any* claim into the District Court. It is probable that the word "*purview*" was intended by the framers of the act to refer to the classes of claims mentioned in the *proviso* of the third section. This is in harmony with the rest of the act, for the proviso of the third section enacts that the *Commissioners* shall in no case report favorably upon claims which have been previously submitted to any other board "*acting under the authority of Congress*" "*and rejected* as being fraudulent or procured or maintained by improper means, nor upon claims which have been "already twice rejected *on the merits* by previous boards," and it would seem proper to place the District Court under the same restrictions in regard to its adjudication upon the claims presented to it. In this view the petition *does* state facts which show that this claim does not come within the *purview* of section three. For facts are stated in the petition which show that this is a claim founded on a *complete grant* of lands situated in *Missouri* and *Arkansas*, and comprising *more than a league square*, and it has been shown in the former part of this argument that until the Act of 1860 was passed there never had been a tribunal or board "acting under the authority of Congress" which had the power to reject (or to pass upon in *any* manner) either for fraud or on their merits or otherwise,

claims to land in Missouri or Arkansas, founded upon a *complete* grant and containing *more than one league square.*

But aside from the foregoing consideration, the wording of the eleventh section of the act makes it unnecessary for the petitioners to allege the facts specified in the ground of demurrer under consideration. That section provides that *every* claim of a certain class may be presented to the District Court, and then adds: "*unless* such claim comes within the purview of the third section of this act;" the words quoted constitute an *exception*, a *proviso*, ushered in by the word "unless;" they are not *included* in the enacting clause, which covers *all* claims of the class specified, but follow it as a proviso, and except certain claims from its enactment. The rule of pleading in such a case is well settled; when the *enacting clause* of a statute *makes an exception to the general provisions* of the act, the pleader must negative the exception, but where the exception is contained in a *proviso*, the pleader need not negative the exception, but the other party may set it up in avoidance of the general provisions.

Muller *vs.* U. S., 4 Ct. of Cl., 61.

Fourth.

The Judgment to be rendered.

(*a.*) *Its finality.* This case having been brought into this Court by appeal, the eleventh section of the act of 1860 requires that it shall be adjudged "*de novo*," * * * which decision shall be *final.*" It is not to be sent back to the District Court for a new trial, but all the questions bearing upon the validity or invalidity of the claim are to be finally decided and determined here, and if the decision of this Court upon all the facts presented on the record is that the claim is a valid one "patent shall *there-*

upon (that is directly upon such decision) issue for "so much of the lands claimed as remain unsold, "and for so much as may have been sold, the pro- "visions of section six shall apply and be in force."

The only judgment that this Court or the District Court is authorized to pronounce in these cases is that the claim is *valid*, or that it is *invalid*. The District Court has already pronounced it *invalid*, upon consideration of "all the papers and evidence filed in this cause" (*Rec.*, p. 57). All objections raised by the demurrer as to merely formal and technical matters were presumably passed over and considered as not well taken, and only the objections to the *merits* of the claim regarded as of any weight, and upon the strength of these it was adjudged that the claim *upon its face*, and admitting all the facts alleged in the petition and in the documents and evidence filed with it, is without merit and invalid.

If, as the appellants claim, this adjudication is erroneous, the judgment of this Court must be that the claim is valid, and it must be final.

Act of 1860, § 11,12 *Stat. at Large*, 85.
See also opinion of Mr Justice Bradley, in *Lynd's Case*, 11 *Wall, page* 645.
See also *Tyler* vs. *Hand*, 7 *How.*, 573.
Coke on Littleton, 71 *b.* 72 *a.*

(*b.*) *The extent and effect of the judgment of this Court.*

As will be seen from Exhibit G (*Rec.*, *p.* 39) about one half of the lands described in Carondelet's grant lie in Arkansas, and the rest (with the exception of a small portion in the Indian Territory), in Missouri. Are the appellants, in the event of a favorable judgment, to be allowed to apply it only to that portion of the grant which lies in Missouri or to the whole tract?

It is claimed that the Act of 1860 authorizes in letter, as it certainly does in spirit, an adjudication which will operate upon all the land covered by the grant.

The first section allows all persons claiming *any* land in Missouri by virtue of a grant from any foreign government, etc., "to present their *titles for* "*confirmation*," these claimants, by virtue of that act, claiming *some* lands in Missouri have presented their *title for confirmation*; this title rests upon and is evidenced by a grant conveying to their ancestor a tract of land, through nearly the centre of which the boundary between Arkansas and Missouri now runs.

The confirmation of this title by an adjudication pronouncing it *valid* would be a confirmation of the whole title. Power is conferred by the eleventh section, upon any District Court of the United States within whose district "*any part* of the land "claimed may lie" to adjudicate upon the whole claim and to confirm the whole title, as well in respect to the land lying without its district, as in respect to that lying within, and this Court of course has the same power in passing upon these cases on appeal. By an adjudication, favorable to these claimants, the grant is in effect declared valid and the title of the claimants under it is confirmed; in that case the decision of this Court should apply to the portion of the land granted which lies in Arkansas and the Indian Territory, as well as to that lying in Missouri, and having the power to pass such a judgment, it has also necessarily the power to carry that judgment into effect and to award to the appellants the remedy provided by the act, as to the whole tract covered by the grants.

Over vs. *Gallagher*, 93 *U. S.*, 206.
1 *Brown & Hadleys Com.*, 74.

This is a perfectly fair construction of a statute which purports in its title to be an "act for the *final* "adjustment of private land claims," and whose provisions are to be carried out upon the "principles "of *justice and equity.*" It is a highly remedial statute, and upon the well-known principle of construction should be interpreted favorably and liberally,

and in such a manner as to advance the remedy (*Sedgwick on Statutes,* 308); and when it states that *any* person claiming *any* lands in Missouri, may *present his title for confirmation* in *any* District Court within whose jurisdiction *any part* of the lands claimed may lie, and that the Court may pass upon the validity of his claim and confirm his title upon principles of justice and equity, it surely is not adopting a too liberal construction to declare that the jurisdiction of the Court extends to that portion of a grant coming within its provisions which may happen to lap over into another District, even though that District may be situated in another State.

Commenting on the manner in which these claims are to be regarded and passed upon by the Courts Mr. Justice Grier, in *United States* vs. *Johnson*, 1 *Wall* 329 says: "In taking objections to these Mex-"ican grants, it ought to be remembered that the "case is not brought here on a writ of error with a "bill of exceptions to the admission of every item of "testimony offered and received below. Nor is it a "part of the duty of counsel representing the gov-"ernment to urge microscopic objections against an "honest claim * * * * *. When there is any just "suspicion of fraud or forgery the *defence should be* "*made below* and the evidence to support the charge "should appear on the record:" and Mr. Justice Field, in *United States* vs. *Aguisola*, 1 *Wall*, 358, after quoting the above, says "to these observations "we will only add that the United States have never "sought by their legislation to evade the obligation, "devolved upon them by the treaty of Guadaloup "Hidalgo, to protect the rights of property of "the inhabitants of the ceded territory or to dis-"charge it in a narrow and illiberal manner. "They have directed their tribunals, in passing "upon the rights of the inhabitants, to be gov-"erned by the stipualtions, of the treaty, the "law of nations, the laws, usages and cus-"toms of the former government, the principles "of equity, and the decisions of the Supreme Court

"so far as they are applicable. They have not "desired the tribunals to conduct their investiga- "tions as if the rights of the inhabitants to the "property which they claim, *depended upon the* "*nicest observance of every legal formality.* They "have desired to act as a great nation, not seek- "ing, in extending their authority over the ceded "country, *to enforce forfeitures*, but to afford pro- "tection and security to all just rights *which could* "*have been claimed from the government they super-* "*seded.*" This is not a petition to the United States for a *gratuitous* grant of a large tract of land, it is simply asking her, *upon her own invitation*, to give up certain land which never really belonged to her, but which she has had the use of for many years, and to give an equal quantity of her public land in exchange for land of these claimants, which she has sold or otherwise disposed of for her own benefit and emolument.

The exact situation and *extent* of this land have been calculated and are shown upon the map, Exhibit G, and in the certificate of the surveyor George H. Day, annexed to his affidavit (Rec., pp. 39, 40). It is there and in the second amended petition (Rec., p. 34) stated that ten Spanish leagues mentioned in the survey and grant are equivalent to thirty-seven and seven-eighths English miles; this is admitted by the demurrer, and the land specified in Carondelet's grant should be considered as accurately designated upon said Exhibit G, so far as this measurement is concerned. The appellants' authority for the assertion that ten Spanish leagues are equal to thirty-seven and seven-eighths English miles is "*Neuman and Barrett's* Dictionary of the Spanish and English Languages, by M. Seone," and also "*Law 5, Title 9, Book 9, of the Novisima Recopilacion.*"

Sixth.

As to the rights of individuals not parties to this proceeding to participate in the results of a favorable judgment.

The Clerk of the District Court has sent up with the record certain documents consisting of petitions by various parties (Rec., pp. 13,48,49) asking to be joined as petitioners in the case, and orders of the District Court (Rec., pp. 50, 52) making them parties and allowing them to adopt the second amended petition as their own.

Most of these petitions were filed and all of the orders made subsequent to the argument and submission of the case, and all, as appears from the record, without any notice whatever to the original petitioners or to the United States, and most of these parties claim under one John Wilson, who they allege received a conveyance of an undivided interest in this grant from Valliere's heirs. It has been already judicially determined that the instrument by virtue of which this claim is made was not intended to be and was not a conveyance of any portion of this grant.

See. 18 *Ark. Rep., page* 65.

But the whole matter is outside of this case. These petitions are all vague in the extreme, no evidence is filed in support of the facts, nor are there even any verified statements contained in them ; the parties to the suit had no notice, or opportunity to show, what could easily have been shown, that none of the intervening parties had any right to be joined as petitioners, and, finally, none of the intervenors have appealed, and they are not now before this Court.

The Court has no jurisdiction to decide in these cases between adverse claimants, or to *partition* the land among individuals, it simply confirms the title to those who are before it, and who show them-

selves entitled under the act, and leaves individual interests to be ascertained afterwards.

If other parties have interests, the confirmation of the title in those who are before the Court enures to the benefit of the former as well as the latter.

Putnam vs. *United States*, 1 *Hempstead*, 332.
Bullett vs. *United States*, *Id.*, 333.
Martin vs. *United States*, *Hoffman's Rep.*, 147.
United States vs. *Ortega*, *Id.*, 135.
Dana vs. *United States*, *Id.*, 87–89.

In this last case the Court says "The claimants "have thus shown a *prima facie* case to the land "petitioned for, and as it is clear that the United "States have no rights in the land as part of the "public domain, we consider it our duty to confirm "this claim and to leave the parties to litigate be- "tween themselves any questions which may arise "as to the * * * * conveyance by the heirs of "the original grantee. The decree of the Court can "have no effect upon the conflicting rights of third "parties, and merely determines the validity of the "claim as against the United States."

And in *Percheman's case*, 7 *Pet.*, 51, Mr. Chief Justice Marshall concludes the opinion of the Court in these words (*page* 98): "The Court does not en- "ter into the inquiry whether the title has been con- "veyed to Sanchez or remains in Percheman; that "is a question in which the United States can feel "no interest, and which is not to be decided in this "cause. It was very truly observed by the terri- "torial Court that this objection is founded alto- "gether on the suggestion of a *private adverse* "*claim*, but adverse claims *under the law giving* "*jurisdiction* to the Court are not to be decided or "investigated."

Recapitulation.

In conclusion, and as the result of a very careful and laborious consideration of this case, we respectfully submit that the facts set forth in the record show conclusively.

1st.—That the original grant to Valliere is genuine.

2d.—That it was made by a duly authorized person.

3d.—That the description in the grant is definite and certain.

4th.—That it conveyed to Valliere and his heirs forever a valid, absolute and complete title to the lands described.

5th.—That Valliere died intestate and that these appellants are his direct descendants and lawful heirs, except the appellant Duryea, who is a grantee of an undivided interest.

6th.—That nothing has ever been done by the governments of Spain, France, or the United States or by Valliere or his heirs to cut off the rights of Valliere's heirs under this grant.

7th.—That the United States took possession of all the land granted and has sold and disposed of it contrary to the rights of said heirs and without ever making them any compensation.

8th.—That by the acts of 1860 and 1872 the United States has volunteered to restore to Valliere's heirs all of the land covered by this grant which has not been disposed of by her, and to give them an equal quantity of her public land for such as she has disposed of.

9th.—That these appellants have accepted this offer, and have presented their claim within the time limited, and in the manner prescribed by the act by which the offer is made.

And, under these circumstances, every principle of justice and equity requires that the claim of these appellants should be adjudged valid and their title confirmed to them.

The appellants pray that the decree of the Court below be reversed, that their title under this grant be confirmed, and their claim adjudged valid, and that a decree be entered by this Court directing the issuance to them of patent for such of the lands designated in Exhibit G as have not been disposed of by the United States, and of land warrants representing an equal quantity of the public lands for such as *have* been so disposed of, as provided in Section 6 of the Act of 1860.

WM. H. DURYEA and
J. WARREN GREENE,
Of Counsel for Appellants.

REPLY TO APPELLEE'S BRIEF.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1878.

No. 654.

BENJAMIN H. SCULL *et al.*,
Appellants,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

SUBMITTED UNDER RULE XX.

WM. H. DURYEA,
J. WARREN GREENE,
For Appellants.

Supreme Court of the United States.

BENJAMIN H. SCULL, *et al.*,
Appellants,

vs.

THE UNITED STATES,
Appellee.

No. 654.
October Term,
1878.

REPLY TO APPELLEE'S POINTS.

I.

Counsel for the United States asks that this claim be rejected on four principal grounds:

1. Because there is defect of proof.

2. Because there is suspicion of fraud *based upon probable ground.*

3. Because the description in the grant is vague and uncertain.

4. Because there is other sufficient cause; and to support these propositions, not only are facts which appear on the record ignored and distorted, the law applicable to them erroneously stated, and matters entirely outside of and irrelevant to the record improperly brought in, but the Court is asked to take judicial notice of alleged states of facts which never existed.

A reply on the part of the appellants is necessary more for the purpose of correcting these misstate-

ments and errors and rescuing the real issues in the case from the confusion into which they have been thrown by the argument for the appellee, than of answering any real objections to this claim which have been suggested by it.

In the first place, counsel for the United States seems utterly to have ignored the fact that this case comes up on *demurrer*, and that thereby a limited range has been given to the discussion of facts.

While it is conceded that only the *facts*, which *properly* appear on the record, and which are not inconsistent with each other or with other facts of which the Court takes judicial notice, are admitted by the demurrer; yet it is insisted that all *such* facts are admitted, not only those alleged in the petition proper but those which appear in the documents filed with and made part of the petition pursuant to the *requirements* of the act.

The legal effect of these facts and the construction of the documents contained in the record are the subjects of consideration for the Court. And although these facts are to be taken as strongly against the petitioners as their plain and obvious meaning will permit, yet no *inference* is to be drawn from them which they will not fully and fairly warrant; the petitioners are not to be called upon to defend themselves against insinuations which the United States by demurring to their petition has prevented them from meeting.

It is also insisted that the deeds, Exhibits, &c., filed in this cause, and which have not been specially demurred to, cannot be objected to in this Court, and that the certified copies of papers and affidavits must be regarded as evidence of the facts contained in them, so far as they are not impeached on their face; they are filed "as evidence" within the meaning of Rule 13, for the Act of 1860 requires "evidence" to be filed.

Nor are the appellants to be called on to answer objections to mere matters of *form* not contained in the demurrer.

That Section 954 of the Revised Statutes applies to *all* "civil causes," whether at law or in equity, is sufficiently evident from other sections in the same Title where the same word "cause" is used qualified by such words as "other than *equity* and admiralty causes," "common law," &c.

(*See* §§ 914, 915.)

The *office* of a demurrer is stated too narrowly by counsel for the appellee (*Brief, pp.* 34, 35) as simply calling for "the judgment of the Court whether the defendant shall be compelled to make answer to the plaintiffs' bill." It may (as in this case the first, eighth and tenth grounds of demurrer do) put in issue the whole merits of the case, and call for a final judgment of the Court upon them.

See Tyler v. *Hand*, 7 *How.*, 373.

II.

Defect of Proof.

The "defects of proof" complained of, so far as they relate to the *form* and admissibility of the evidence filed by petitioners are not properly in the case, and should not be considered in this Court; such objections are prohibited by Rev. Statutes § 954, and Supreme Court Rule 13, above referred to. But the statements of counsel on this head are so erroneous and misleading that they cannot be allowed to pass without correction.

First.—As to the paper called an "Order of survey." (*Printed Rec., p.* 30).

It is stated (*Appellee's Brief, p.* 36) that this "plainly appears not to be an order of survey;" but taking it by itself there is nothing in its terms inconsistent with its being an order of survey; Trudeau speaks of it in his certificate of survey as an "order," and Carondelet in his final grant men-

tions the "figurative plan made by *my order* by the surveyor general" * * * * "and in virtue of *my order* in June of the current year, by which I made him a grant, and ordered the surveyor general to put him in possession."

Second.—The copy of the certificate of survey is objected to as not properly certified under § 2,225 Rev. Stat. (*Appellee's brief, p.* 41).

The officer designated by that section is "the surveyor-General of the *State* of Louisiana," the certification is by "John Ray, Register of State Land office, *and custodian of Surveyor General Records*," and he certifies that the "original plat and process verbal of survey is found among the records of the late Surveyor General of this State (*i.e.* of the State of Louisiana), *and in possession of this office.*" When these records passed from the custody of the Surveyor General to that of the *Register* does not appear, but the transfer was presumably regular and the Register is *pro hac vice* the Surveyor General; at all events the certification is made by the officer having the legal custody of the documents, and certified to be such by the Secretary of State (*Rec., pp.* 41, 42). It is noticeable that the appellee's argument omits to state that the Register also signs himself "*Custodian of Surveyor General Records;*" and it is also a singular fact that the case of *Lavergne* v. *Elkins*, 17 *La.*, 221, cited as an authority for the proposition that "these papers do not purport to come from the "proper depositary, nor to be authenticated by the "proper official," is an authority for the direct contrary of that proposition, for there a copy of a survey or concession certified by the "*Register of the Land Office of New Orleans*" was admitted as evidence.

Third.—It is further objected (*Appellee's brief, pp.* 42, 47), that the certified copy of the final grant is not evidence; no objection of this kind is found in the demurrer, but that fact is apparently con-

sidered as of no importance; counsel for the appellee claims (*Appellee's brief, p.* 35), that rule 13 does not forbid this objection to be taken for the first time in this Court, for the reason that the documents are not "found in the record as evidence" within the meaning of that rule, and yet the objection is taken to them "*as evidence.*"

The objection consists of three parts:

1st. That the book from which the copy purports to be made, "purports to contain *only* the titles issued by the Governors of *West Florida.*

2d. That Havana never was the proper place for the records of land titles in Louisiana.

3d. That *certified copies* of these papers are not evidence unless the originals have been presented and proved before one of the boards created by Act of Congress to pass upon Louisiana land titles, in which case a copy certified by "*such board*" may be received.

These propositions are attempted to be established partly by an erroneous statement as to the contents of the certification of the grant, and partly by the citation of authorities, none of which bear out the propositions, and some of which expressly declare the contrary.

1. As to the first proposition (*Appellee's brief, p.* 43), the certification states (*see translation, Printed Rec., p.* 54), that the grant is found "in the book in which the *Spanish Government of West Florida* registered the titles which it issued for grants of vacant or King's lands in the year one thousand seven hundred and ninety-three, and which exists in the offices in my charge, attached to the other papers of the said *provinces*" (the last word in the plural); this is not a statement that *only* the lands granted in West Florida are registered in that book,

but simply that it is the book in which West Florida titles are registered.

It has been shown already (*see appellant's argument, p.* 34), that West Florida was subordinate to Louisiana. "The Governor of Louisiana was also Governor of West Florida, and although there was always a governor at the post of Pensacola, he was subordinate to the first" (2 *White Rec., p.* 397). "The Spanish provinces of Florida and Louisiana were under the jurisdiction of the Captain General of Cuba, but the Governor of Louisiana was always recognized as having authority over the Governor of West Florida, and as having power to grant lands in that province."

Murdock v. *Gurley*, 5 *Robinson La. R.*, 458.

The book then in which the Government of *West Florida* registered its titles, would naturally be the book kept for that purpose by the Government of Louisiana, and the *same* one in which *Louisiana* titles were registered.

2. As to the second proposition (*Appellee's brief, pp.* 43, 46), it has also been already shown that Havana was the Capital of the Spanish colonies in America, and that all the Governors General of provinces were subordinate to the Captain General of Cuba (see authorities, Appellant's brief, p. 34), and any directions of the Spanish Government as to the removal of colonial archives or records to Havana (or in fact to any other place) would have been authoritative, and the place to which the records might be so removed would be a proper place for such records.

The authorities of Spain would recognize a certificate coming from such a place, and our Courts require no further evidence than Spain would have required.

U. S. v. *Davenport*, 15 *How., p.* 7.
Mitchel v. *U. S.*, 9 *Pet., p.* 732.

That orders for the removal of real estate records to Havana from other provinces *were* made, is shown by the very citation in appellee's brief from White's Recopilacion (*brief, p.* 44); the statement (*Appellee's brief, p.* 44, *foot*), of the reason for this particular removal is pure assumption; it may have been the reason, but that would not show that other removals might not have been made for other reasons.

Nor do the quotations from Major Stoddart (*appellee's brief, p.* 45) prove anything important. In upper Louisiana the preliminaries of passing upon a petition for land and making the survey were attended to there by the commandant and surveyor, and the papers were then delivered to the petitioner that he might obtain the final grant from the *Governor-General.*

Glenn's case, 13 *How., p.* 258.

The case of *Lavergne* v. *Elkin*, 17 *La.*, 227, is directly against the point attempted to be here established by it, by counsel for the United States (*appellee's brief, p.* 46). It expressly recognizes the fact that original titles were recorded, and that some were taken out of the country (*see p.* 229).

The copy of this grant is certified by the officer having the custody of it, his authority and signature are certified to by "the notaries public of the Royal College" of Havana (*Printed Record, pp.* 55, 56), and their signatures and authority are certified to by the United States Consul. These Spanish notaries are not simply notaries public, as we use the term in this country, as counsel for the appellees seems to think (brief, p. 47), but officers whose duty it is to authenticate documents, and perform various other official acts which are no part of the duties of our notaries.

3. As to the third proposition, that certified copies cannot be received in these cases (*appellee's brief, pp.* 46, 47).

This is attempted to be sustained by the broad statement that original documents under the Spanish regime were not recorded, and that, therefore, the originals themselves must be produced in evidence.

The authorities cited to sustain this point fail utterly in their object, and in some cases establish the very fact which is sought to be overthrown.

Arredondo's case, 6 *Pet.*, 724, is the only one where the *original* of a complete final grant purports to have been given in evidence, and from this fact it is argued that grantees always received the *original* grant, and that it never was recorded and a copy given. But care should be taken to ascertain the meaning of the word *original* as used in these cases, before founding any theory upon its use.

In the case of Mitchel *v.* U. S., 9 Peters, at p. 732, the Court says:

"The deeds of confirmation were made according to the rules of the civil law, adopted by Spain, and in force in Florida and Cuba; the *original is a record and preserved in the office, which cannot be taken out;* a testimonio or copy is delivered to the party which *is deemed to be* and *is certified as an original paper*, having all the effect of one in all countries governed by the civil law. Such is proved to be the law of those colonies, as a fact, *by* Mr. White; such is the form of the certificates in this case, varying in phraseology somewhat, but agreeing in substance and effect, in perfect accordance with the civil law adopted in Louisiana and recognized by this Court in the case of Owings *v.* Hall, decided at the present term. *We, therefore, consider those now produced as original deeds of confirmation* by the governor, duly certified and proved."

The paper in this last case claimed by appellee's counsel to have been the original "with the watermark therein" (*brief, p.* 42) was not the Spanish

deed of confirmation, but one of the other papers in the case—an Indian title.

The appellee's counsel also mistakes the facts in *Glenn's case*, 13 *How.*, 256 (*cited on brief, p.* 38). It was an *incomplete concession*, and could not be made complete till acted on by the Governor-General (*p.* 258). Delassus gave back the petition with his endorsement thereon to the petitioner, and he could retain it or hand it to the surveyor, as he chose, but so long as he *held* it he could not get the complete title.

In *Winter's case* (*cited on appellee's brief, p.* 39) the document referred to was merely an incomplete order of survey.

In *Perchman's case*, 7 *Pet.*, *p.* 85, the Court says:

"It appears, from the words of the grant, that the original was not in possession of the grantee. The decree which constitutes the title appears to be addressed to the officer of the government, *whose duty it was to keep the original and to issue a copy;*" and again on page 85 of the same case: "Whether these acts be or be not construed to authorize the admission of the copies offered in this cause, we think that on general principles of law *a copy given by a public officer, whose duty it is to keep the original*, ought to be received in evidence."

And in *Davenport's case*, 15 *How.*, *at p.* 47:

"The copies made by the Spanish commandant from the protocol and certified by him to be true and genuine, though dated long after the protocol, would be received in evidence in the Courts of Spain, as possessing equal claims to credit *as the primordial or originals.*"

"It was in proof that no *original* could be found in the proper office, *where it should be on file*" (*U. S.* v. *Acosta*, 1 *How.*, *p.* 26).

See also, 1 *White's Recop.*, 297 *et seq.*
2 *White's Recop.*, 340, 353, 354, 372.
Lavergne v. *Elkins*, 17 *La.*, 227.

The foregoing authorities sufficiently refute the position that there is any defect of proof so far as the fact of the certificate of survey and grant having been made, is concerned.

The interest of the claimants is established by the evidence of Creed Taylor (*Rec.*, *pp.* 25–27), who married two of the grand-daughters of the original grantee (*Rec.*,*p.* 25), and is well acquainted with the family pedigree

III.

FRAUD.

The question of fraud is not properly in this case at all. As no allegation or proof of fraud was made by the defendant in the Court below, it cannot be considered in this Court unless it appears unmistakably upon the face of the petitioners' papers. In that case, in order to be availed of it would have to be so unmistakable and clear that the facts relied upon to establish it could be explained in no other possible way ; in other words the fraud would have to be demonstrated, for it is too familiar a principle of law to need the citation of any authorities in its support, that fraud is never *presumed*, but must be proved to exist, and that all the intendments are to be taken against the person alleging it.

In this branch of the case the appellee's argument also contains the same kind of misstatements of fact and misapprehension of authorities which have been already so frequently noticed.

The foundations on which this charge of fraud is based are:

1. *The size of the grant and the fact of its being without any condition* (*Appellee's Brief, p.* 76.)

This would need no further notice were it not coupled with the statement that Judge Martin, in his history of Louisiana, says that "twelve square leagues to Baron de Bastrop, for colonization purposes was the largest known grant." So far as this is authority at all, it is only authority for the fact that Judge Martin knew of no larger grant made for the purpose of carrying out Carondelet's "project of inducing French royalists to emigrate to Louisiana." (*see quotation on pp.* 2, 3 *of appellee's brief*).

2. *That it purports to be a complete grant by Carondelet to land in upper Louisiana* (*brief, p.* 77, *top*).

The authorities cited from American State Paper to show that this was unusual prove at most that the *origin* of the concession was *generally* (not always) with the Lieutenant Governor, and the quotation from Stoddart (same page,) shows that the *final grant* was always made by the Governor General.

See also Glenn's Case, 13 *How., p.* 258.

3. *The production of* "*copies from the State land office*" has already been sufficiently noticed.

4. *The different phraseology of the grant from that used in the survey* (*brief, p.* 77; *foot*). Major Stoddard is again called upon here to support a proposition to which his words have no reference—a concession founded upon the *petition* of an individual would naturally follow exactly the words of the petitioner, and concede exactly what he asked for, but there could be no good reason why the phraseology of a grant should follow exactly that

of the survey, the same tract described in the survey might be granted without following the exact words of the survey.

5. *The confession that what purports to be a survey was not so in fact* (*brief*, *p.* 78). This is relied upon as one of the strongest indications of fraud, but it is difficult to see who practiced any fraud in this particular, or who was deceived. Trudeau certainly did not pretend to have made an *actual* survey, for Carondelet in his grant states expressly that no actual survey was made (*Rec.*, *p.* 55), and the *latter* certainly was not deceived into the supposition that he was making his grant upon the basis of an *actual* survey; he bases his description upon that furnished by Trudeau, by his order, with full knowledge of the character of the document.

The circumstance that the certificate of survey speaks of "trees and monuments," when none were noted on the plat, is of no weight; it is mere statement that the *plat* shows all the trees and posts marked by the *survey*; if there *were* no such trees or posts, none could or would be shown on the plat. It is much easier to suppose that the formal parts of an ordinary certificate of survey were followed from convenience or from sheer habit, than that a *fraud* was practiced.

The authority from 2 *White's Recop.*, 354, cited in support of the proposition that "when no actual survey was made the surveyor so stated" (*foot of p.* 78, *Appellee's Brief*), does not at all bear out that statement, but it *does* show that grants were made in which the descriptions were based upon plats and process verbal, furnished by the surveyor, where *no actual survey* had been made, and that this was well understood.

The translation of this certificate of survey, filed by order of the District Court (*Rec.*, *p.* 42) is not subject to the criticisms contained in Appellee's brief (*pp.* 48, 49, 50). This is the translation referred to throughout the appellant's argument. The

translations contained in the petitions are incomplete in the particulars mentioned.

5. *The long delay in presenting this claim, &c.* (*Appellee's Brief, p.* 79). Under this head facts are assumed for which there is absolutely no warrant in the record in this case or elsewhere.

That the claimants were guilty of laches in presenting this claim; that they have unreasonably delayed it; that it was in no way brought to the notice of the government; that they have allowed it to sleep, are all matters of pure assumption. If this case had come to trial upon contested issues, and the question of laches had properly arisen, the petitioners would have had an opportunity to show what had been done by them or their ancestors in regard to this claim, or to explain any apparent inaction. This, however, they were prevented from doing by the demurrer, and all intendments on this point must be in their favor.

The assumption on pages 73, 74 and 75, that Valliere never took possession of the land granted to him, or gave any intimation of his acceptance of the grant, is also utterly without foundation. There is absolutely nothing in the case to show that he did not, nor does it appear that there was, under the Spanish law, any *necessity* for his doing so. Spain had parted with her title, and given it to him absolutely and unconditionally.

The facts connected with the presentation of this claim to the Court in Arkansas (1 *Hempstead*, 337), are not as stated on pages 80 and 82 of Appellee's brief. The case as reported in Hempstead seems to be a mere statement of it by the *reporter*, and the remarks there made are apparently the comments of the reporter, and not an opinion of *Judge Johnson*, as stated in Appellee's brief (*pp.* 80, 82). The Act under which the claim was there sought to be presented was the Act of 1844, which, as has already been seen, applied *only to incomplete* grants (*Ap-*

pellant's Brief, p. 26), and under which the Court therefore had no jurisdiction of this claim. It would have been foolish for the claimants to have persisted in the prosecution of the case, with the certainty of its being finally dismissed.

The petitioners have never had their day in any Court having jurisdiction of their case, and it is an absurdity to say that the order of a Court not having jurisdiction of a case is "*res adjudicata*" in regard to that case.

The quotation from *U. S.* v. *Moore*, 12 *How.*, 222, 223 (Appellee's brief, p. 83), is entirely applicable. The claim in that case was an incomplete one, founded only on a *receipt for money*, and the cases of *Simon* and *Hughes*, cited in the next paragraph, were also inchoate, incomplete concessions, or orders of survey. It has been already seen that the difference between complete and incomplete titles, as to the effect upon them of laches, is very wide (*Appellant's brief, pp.* 27--30).

The reasons or necessities which operated to delay the presentation of this claim do not appear on the record, except in a very general way at the close of Creed Taylor's deposition (*Rec., p.* 27). If they had been called for and stated upon a trial of the case, it is probable that no objection on the ground of laches would have been considered worth taking. Some of these reasons may suggest themselves to the Court, such as the death and intestacy of Valliere, in 1799, the subsequent cession of Louisiana, first to France and then to the United States, and the confusion resulting from the change of government, the removal of records, and later, our own civil war, which covered nearly the whole currency of the Act of 1860.

The suggestion on page 50 (*appellee's brief*), that the claimants have misstated the effect of section 14 of the Act of March 26, 1804, would seem not to be born out by the enactment in that section. It is

true that the prohibition relates to "lands *belonging to the United States*," but that expression would refer as well to lands *claimed* or *considered* by the United States as belonging to it (until it was settled by some competent tribunal that the claim of the United States was not valid) as to lands *actually* belonging to the United States; and that the United States *claimed* the ownership of the area covered by this grant is shown by the fact that she caused it to be surveyed as public lands.

See also *Act of March 3d*, 1807, 2 *Stats.*, 445.

IV.

Vagueness of Description.

The question of vagueness and uncertainty of description (*appellee's brief, p.* 51, *et seq.*) must be noticed in order to point out some further inaccuracies of statement on the part of appellee.

The appellants urge that for the purpose of ascertaining what was intended to be granted, the three papers which refer to each other, and which formed parts of the same transaction, to wit., the order of survey, certificate of survey and plat and the final grant, may be read together; that by doing this the intention of Carondelet to grant ten leagues on each bank of the White river, from the source of its most western arm to the rivers Buffalo and North Fork, is perfectly clear; that when it appears that through a mistaken location of this source the courses cannot be run in the directions specified in the grant, the well known rule that known monuments *control* courses and distances (*White* v. *Luning*, 1 *Otto*, 514; *see also* 7 *Wheat.*, 7; 17 *Johnson, N. Y.*, 29; 18 *Wendell, N. Y.*, 157) must be applied, and that the lines must run, beginning at the source of White river, in such a manner as to take in ten leagues on

each side, until they intersect, on one side the North Fork, at a point ten leagues in a direct line from its "*confluence with White river*," and on the other side the Buffalo river, at a point ten leagues in a "*direct line from White river.*" This last direction is to be noticed, for it does not make the Buffalo river a boundary of the grant "*for ten leagues*," as erroneously stated (*appellee's brief, p. 55, near the foot*), but it makes that river a boundary of the grant for its *whole distance* (whether that be more or less than ten leagues), after the line has once intersected it at a point distant ten leagues in a direct line from White river; from that point the line is to descend the "Buffalo river to its confluence with the White river (*Rec., p. 55*).

The statement in this connection (*appellee's brief, p. 52, top*) that the certificate in this case purports to have established the bounds by "marked, spotted and designated trees, and by hubs and posts," &c., is directly contrary to the facts as they appear on the papers. The only monuments referred to in the survey as locating the land are natural objects, rivers, and the statement at the end of the survey that the trees, posts, &c., are designated on the plat, though superfluous, is perfectly consistent with the facts, for no trees or posts are mentioned in the survey as boundaries of the tract, and none are designated on the plat.

The case of *U. S.* v. *King*, 3 *How.*, 773, cited at top of page 53 (*appellee's brief*), is not in point, for there the grant contained no description, but referred for the description to a survey bearing a certain date; the survey put in evidence, though bearing the date referred to in the grant, was *proved* not to be the one referred to, but to be forged and antedated. The survey was, of course, rejected as spurious, and the grant not designating any land whatever necessarily fell through. But in this case the survey though not the result of an

actual measurement of the land itself, nor purporting to be such, is a genuine instrument, and is referred to by Carondelet in his grant, with full knowledge of its character; the appellants are therefore entitled to read the grant in connection with the survey. The three documents mentioned in the petition or copies of them were undoubtedly delivered to Valliere, and together constituted the evidence of his title.

On page 54 of Appelee's Brief, there is another perversion of the language of the grant and process verbal—by the statement that the words "Fountain head as origin of the most westerly branch of the White River," in the process verbal and the words "origin of the most western branch of the White River," in the grant refer to the "West Fork of the White River," as shown upon maps and surveys made many years after the date of the grant, whereas they in fact refer to and must be read in connection with the Plat Exhibit B (Rec., p. 41,) made by Trudeau, upon which he lays out the White River, with two arms or branches, one of which he designates as the Rio Tosque, the easterly branch, and the other as the "most westerly branch," the origin or the fountain head of which he makes the starting point, and as the process verbal and the grant are made to conform to the plat, in this respect, there is no probability that either Trudeau or Carondelet had any reference to any other branches of the White River, in locating the lands granted. The *source* of this most western or main branch as contradistinguished from the branch designated as the "Rio Tosque," was to be the starting point of the grant.

It is also stated (*Appellee's Brief*, *p.* 54), but without reference to any authority that it is an unknown thing "for boundaries of Spanish grants to cross navigable streams," and contrary to the *well known* rule of Spanish surveys—if this *be* a fact it needs some authority to support it.

V.

ABSTRACT OF TITLE.

On this head the appellee claims (*brief, pp.* 63,64), that there should be an abstract setting forth "specially the extent of the interest claimed by each petitioner and how derived." But the petitioners claim in bulk as tenants in common, as well for themselves as for others similarly interested—the original grant to Valliere is set forth, and the deposition of Creed Taylor filed as evidence and as part of petitioners proceedings by the express requirement of the statute, proves the death and intestacy of Valliere, and that these claimants are his direct descendants and heirs, with the exception of William H. Duryea, who is alleged to be a grantee of said heirs, and who claims an undivided interest as tenant in common with them. These are all the facts on this point which the Court is interested in knowing, the parties before it are the ones who are entitled as tenants in common under the grant, should it be adjudged valid, and the exact extent of their individual interests is a matter of no consequence whatever to the United States.

An abstract of title in any *particular form* is not required; if the necessary information is given in any form whatever the requirement of the statute and of the Court is satisfied.

VI.

SWORN STATEMENT.

The insufficiency of the sworn statement filed by petitioners is not assigned as a ground of demurrer to the second amended petition, and is therefore not a question properly before this Court. But as there seems to be a misapprehension in regard to what

the statement in this case consists of, some further explanation on this point may be proper.

It is found at pages 37, 38, 39 and 40 of the printed record, and is made up of the affidavit of one of the claimants, William H. Duryea (p. 37) and Exhibits D, E, F and G annexed to and mentioned in that affidavit. Exhibits D and E are letters from the commissioner of the land office in Washington, Exhibit F is a diagram of the official surveys of the country adjacent to the White river on which is officially stamped the source of White river and its course, and Exhibit G is a diagram of the "land *supposed* to be covered" by this claim, laid off upon a map on which are marked the legal divisions and subdivisions according to United States surveys, then follow (Rec. pp. 39, 40), an affidavit of George H. Day, and a verbal description by him of the boundaries. These papers all refer to each other, and taken together constitute the sworn statement.

The last Exhibit, G, is a map showing the exact divisions and subdivisions of the United States surveys, and those of them included within the red lines are the ones supposed to be covered by this grant. It can hardly be supposed that a statement more exactly conforming to the requirements of the Act of 1860, or more clearly designating the lands claimed could be made, or desired by the United States.

VII.

New Parties.

The questions arising under this head (*appellee's Brief*, pp. 71, 72) have already been sufficiently discussed (*Appellant's argument*, pp. 36, 45).

The case of *U. S. v. Innerarity*, 19 *Wall*, 597. cited on appellees brief, p. 72, is not an authority for any question which arises in this case.

There permission was asked after the time allowed for presentation of claims had run out, to *substitute* an entirely outside party in the place of the petitioner who had filed the claim before the expiration of the Statute, but who was admitted not to be the proper party to present it.

The case of parties claiming in the same manner as the petitioners and in common with them, asking to be *joined* with them, is a totally different case.

VIII.

THE JUDGMENT.

The judgment of this Court is directed by the Act to be that the claim is valid or invalid; nothing further. It is adjudged valid; the United States, and *only* the United States is in possession of all the information necessary for the issuing of patent for all the land covered by the claim, and *not sold* and of scrip for what has *been disposed of*. The "*difficulty*" suggested by appellee (*see brief, pp.* 83,84) is not a real one, and can never arise.

Questions of practical detail and of the administration of the property are matters which are not and cannot be before this Court. All that is *here*, involved are the questions of law arising upon the record before the Court.

WM. H. DURYEA,
J. WARREN GREENE,
Of Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

BENJAMIN H. SCULL ET AL.
vs.
THE UNITED STATES
} No. 654.

APPEAL FROM UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF MISSOURI. SUBMITTED UNDER RULE XX.

APPELLEES' BRIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

BENJAMIN H. SCULL ET AL.
vs.
THE UNITED STATES.
} No. 654.

APPEAL FROM UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF MISSOURI. SUBMITTED UNDER RULE XX.

APPELLEES' BRIEF.

MAGNITUDE OF THE CLAIM.

Confirmation is asked of an alleged grant of over seven and a quarter million acres of land, *i. e.*, of 7,276,800 acres, or 11,370 square miles (Record, 40, bottom)! Its area is greater than that of Maryland, considerably larger than Vermont, and than New Hampshire and Rhode Island put together—stretching along the White River, through a large section of the populous and fertile States of Missouri and Arkansas, embracing the whole or parts of twenty-four counties, and 7,000 acres in Indian Territory. As it claims a territory but 12 miles

less than the kingdom of Belgium, it may be well said that the demand is for a principality.

Appellants' counsel commence their argument (at the foot of page 6) with the preliminary statement "that the disposition to be made of this case cannot in any way be affected by the magnitude of the claim"—a proposition they proceed to support by citations.

While it is doubtless true that the same principles of law and justice are to govern the admission of evidence and regulate the procedure of the court in determining the validity of a large claim as a small one, yet it is also true that the magnitude of the claim is sometimes of itself a matter to be considered in determining upon its genuineness, in analogy to that principle which declares gross inadequacy of consideration sufficient evidence of fraud to avoid a contract (Copley *vs.* Flint, 1 Rob. La., 125), especially when taken in connection with the conduct of the parties holding and asserting the claim.

At the commencement of his opinion in the case of the Rendsborg, Sir William Scott observed, "It may be the abstract duty of persons in a judicial situation to look only to the merits of the question, but the magnitude of the interests involved may in some cases be *a very essential ingredient in the question itself*, and is, in all, a powerful call upon the painful attention of him who has to decide upon it" (4 C. Rob., *122 top).

That able jurist and accurate historian Judge Martin, who investigated the facts stated in his book as carefully as if they pertained to the trial of a cause before him, writes, in his history of Louisiana, that "the project of inducing French royalists to migrate to Louisiana continued to be a favorite one with the baron [Ca-

rondelet]; and, with a view of promoting it, very extensive grants of land were made. *The most considerable one was that made to the Baron de Bastrop. It was of twelve square leagues*, on the banks of the Washita. The emigrants were intended to be employed in the culture of wheat and manufacture of flour," &c. (2 Martin's Hist. of La., 132, top). Therefore, as construed by this court, the grant was not, in effect, a grant of twelve square leagues to Baron de Bastrop, but of each little wheat-farm of four hundred arpens, according "to the known policy of the Spanish Government, which was to encourage population and agriculture, but to discourage speculation, *by refusing to grant large districts of arable lands to single individuals*" (United States *vs.* Philadelphia, 11 Howard, 651).

The Aredondo claim and others were also for colonization purposes.

Having called attention to the nature of the claim, the treaties and statutes which have relation to the subject of lands in the Territory of Louisiana will be presented for easy reference in the course of the argument, which is resumed upon page 33, *post*.

TREATIES.

The French first permanently settled Louisiana, remaining in possession of it until 1762, when it was ceded to Spain, November 3, 1762, by a treaty the terms of which were never made public. This transfer was distasteful to the people, and October 1, 1800, by the treaty

of St. Ildefonso, the country was retroceded to France, and by that republic sold to the United States for fifteen millions of dollars in 1803.

STATUTES.

Upon the last day of October, 1803, a law was passed authorizing the President to take possession of the ceded territory (2 Stats., 245). March 26, 1804, Congress erected the country into two Territories, and provided for its government. That which comprises the present States of Missouri and Arkansas and Indian Territory was designated as Louisiana Territory (2 Stats., 287, top). The fourteenth section of this act is as follows, viz:

"SEC. 14. *And be it further enacted*, That all grants for lands within the territories ceded by the French Republic to the United States by the treaty of the thirtieth of April, in the year one thousand eight hundred and three, the title whereof was, at the date of the treaty of St. Ildefonso, in the crown, government, or nation of Spain, and every act and proceeding subsequent thereto, of whatsoever nature, towards the obtaining any grant, title, or claim to such lands, and under whatsoever authority transacted, or pretended, be, and the same are hereby declared to be, and to have been from the beginning, null, void, and of no effect in law or equity: *Provided, nevertheless*, That anything in this section contained shall not be construed to make null and void any *bona fide* grant made agreeably to the laws, usages, and customs of the Spanish Government to an actual settler on the lands so granted, for himself and for his wife and family; or to make null and void any *bona fide* act or proceeding done by an actual settler agreeably to the laws, usages, and customs of the Spanish Government to obtain a grant for lands actually settled on by the person or persons claiming title thereto, if such settlement

in either case was actually made prior to the twentieth day of December, one thousand eight hundred and three: *And provided further*, That such grant shall not secure to the grantee or his assigns more than one mile square of land, together with such other and further quantity as heretofore has been allowed for the wife and family of such actual settler, agreeably to the laws, usages, and customs of the Spanish Government; and that if any citizen of the United States, or other person, shall make a settlement on any lands belonging to the United States within the limits of Louisiana, or shall survey or attempt to survey such lands, or to designate boundaries by marking trees or otherwise, such offender shall, on conviction thereof in any court of record of the United States or the Territories of the United States, forfeit a sum not exceeding one thousand dollars, and suffer imprisonment not exceeding twelve months; and it shall, moreover, be lawful for the President of the United States to employ such military force as he may judge necessary to remove from lands belonging to the United States any such citizen or other person who shall attempt a settlement thereon (2 Stats., 287 to 289).

By the act of March 2, 1805, c. 26, it was enacted—

That any person or persons, and the legal representatives of any person or persons, who, on the first day of October, in the year one thousand eight hundred, were resident within the territories ceded by the French Republic to the United States, by the treaty of the thirtieth of April, one thousand eight hundred and three, and who had, prior to the said first day of October, one thousand eight hundred, obtained from the French or Spanish Governments, respectively, during the time either of the said governments had the actual possession of said territories, any *duly registered* warrant or order of survey for lands lying within the said territories to which the Indian title had been extinguished, and which were on that day actually inhabited and cultivated by such person or persons or for his or their use, shall be confirmed in their claims to such lands, in the same manner as if

their titles had been completed: *Provided, however*, That no such incomplete title shall be confirmed unless the person in whose name such warrant or order of survey had been granted was at the time of its date either the head of a family or above the age of twenty-one years, nor unless the conditions and terms on which the completion of the grant might depend shall have been fulfilled.

SEC. 2. *And be it further enacted*, That to every person, or to the legal representative or representatives of every person who, being either the head of a family or twenty-one years of age, had, prior to the twentieth day of December, one thousand eight hundred and three, with the permission of the proper Spanish officer, and in conformity with the laws, usages, and customs of the Spanish Government, made an actual settlement on a tract of land within the said territories not claimed by virtue of the preceding section or of any Spanish or French grant made and completed before the first day of October, one thousand eight hundred, and during the time the government which made such grant had the actual possession of the said territories, and who did, on the said twentieth day of December, one thousand eight hundred and three, actually inhabit and cultivate the said tract of land, the tract of land thus inhabited and cultivated shall be granted: *Provided, however*, That not more than one tract shall be thus granted to any one person, and the same shall not contain more than one mile square, together with such other and further quantity as heretofore has been allowed for the wife and family of such actual settler, agreeably to the laws, usages, and customs of the Spanish Government: *Provided, also*, That this donation shall not be made to any person who claims any other tract of land in the said territories by virtue of any French or Spanish grant.

The next section (3), "for the purpose of more conveniently ascertaining the titles and claims to land in the territory ceded as aforesaid," divides the territory of Orleans into two districts, in each of which a register

of the land-office is to be appointed, with customary powers, as established in offices north of the Ohio. It concludes with the provision that "the President of the United States shall likewise appoint *a recorder of land-titles* in the district of Louisiana," who was required to give the same security and entitled to receive the same compensation as the registers in the land offices.

SEC. 4. *And be it further enacted*, That every person claiming lands in the above-mentioned territories, by virtue of any legal French or Spanish grant, made and *completed* before the first day of October, one thousand eight hundred, and during the time the government which made such grant had the actual possession of the territories, *may*, and every person claiming lands in the said territories by virtue of the two first sections of this act, or by virtue of any grant or *incomplete* title, bearing date subsequent to the first day of October, one thousand eight hundred, *shall*, before the first day of March, one thousand eight hundred and six, deliver to the register of the land-office, or recorder of land-titles, within whose district the land may be, a notice, in writing, stating the nature and extent of his claims, together with a plat of the tract or tracts claimed; and shall, also, on or before that day, deliver to the said register or recorder, for the purpose of being recorded, every grant, order of survey, deed, conveyance, or other written evidence of his claim, and the same shall be recorded by the register or recorder, or by the translator hereinafter mentioned, in books to be kept by them for that purpose, on receiving from the parties at the rate of twelve and a half cents for every hundred words contained in such written evidence of their claim: *Provided, however*, That where lands are claimed by virtue of a *complete* French or Spanish grant, as aforesaid, it shall not be necessary for the claimant to have any other evidence of his claim recorded, except *the original grant* or patent, together with the warrant or *order of survey, and the plat;* but all the other conveyances or deeds shall be deposited with the regis-

ter or recorder, to be by them laid before the commissioners hereinafter directed to be appointed, when they shall take the claim into consideration. And if such person shall neglect to deliver such notice, in writing, of his claim, together with a plat, as aforesaid, or cause to be recorded such written evidence of the same, all his right, so far as the same is derived from the two first sections of this act, shall become void, and forever thereafter be barred; nor shall any incomplete grant, warrant, order of survey, deed of conveyance, or other written evidence, which shall not be recorded as above directed, ever after be considered or admitted as evidence, in any court of the UnitedStates, against any grant derived from the United States. The said register and recorder shall commence the duties hereby enjoined on them on or before the first day of September next and continue to dischargethe same, at such place in their respective districts as the President of the United States shall direct." (2 Stats., 324 to 327.)

The fifth section directs the appointment of a commission to hear and pass upon claims to land in Louisiana. Among powers given to this commission was that "to demand and obtain from the proper officer and officers all public records in which grants of land, warrants, or orders of survey, or any other evidence of claims to lands, derived from either the French or Spanish Governments, may have been recorded; to take transcripts of such record or records, or of any part thereof; to have access to all other records of a public nature, relative to the granting, sale, transfer, or titles of lands within their respective districts; and to decide in a summary way, according to justice and equity, on all claims filed with the register or recorder, in conformity with the provisions of this act, and on all *complete* French or Spanish grants, the evidence of which, though not thus filed, *may be found of record on the public records of such grants*," &c. (2 Stats., 327.)

It further required the commissioners "to make to the Secretary of the Treasury a full report of all the claims filed with the register of the proper land-office, or recorder of land-titles, as above directed, which may have been rejected, together with the substance of the evidence adduced in support thereof, and such remarks thereon as they may think proper," to be laid before Congress at its next meeting. (2 Stats., 328.)

By the third section of the act of February 28, 1806, so much of the foregoing act of March 2, 1805, "as makes it the duty of *every* claimant to lands within the Territory of Louisiana to deliver to the recorder of land-titles a plot of the tract or tracts claimed by him, is hereby repealed so far as relates to claimants whose tracts had not been surveyed by the proper officer under the Spanish Government prior to December 20, 1803." (2 Stats., 353.) The section then provides that the commissioners may direct the surveyor-general to make such surveys as they may deem necessary for the purpose of deciding upon claims presented for their decision. (*Ib.*)

An act was passed March 3, 1807, forfeiting the claim and right of any person who should take possession of, or settle upon, any lands ceded to the United States by a foreign nation, unless such claim had been previously recognized by the United States; and the like penalty attached to any attempt to survey any of said lands, or to mark trees or otherwise designate boundaries thereon until authorized by law, with a proviso that this should not affect claims to lands in Louisiana before the commissioners had reported and Congress acted thereon. (2 Stats., 445.) Upon the same day another act was approved, entitled "An act respecting claims to land in the Territories of Orleans and Louisiana." By its first

section the requirement found in the above-recited act of March 2, 1805, that no incomplete grant should be confirmed unless the grantee was the head of a family, was repealed.

The second section is this:

"SEC. 2. *And be it further enacted*, That any person or persons, and the legal representative of any person or persons, who, on the twentieth day of December, one thousand eight hundred and three, had for ten consecutive years prior to that day been in possession of a tract of land not claimed by any other person, and not exceeding two thousand acres, and who were on that day resident in the Territory of Orleans or Louisiana, and had still possession of such tract of land, shall be confirmed in their titles to such tract of land: *Provided*, That no claim to a lead mine or salt spring shall be confirmed merely by virtue of this section: *And provided also*, That no more land shall be granted by virtue of this section than is actually claimed by the party, nor more than is contained within the acknowledged and ascertained boundaries of the tract claimed." (2 Stats., 440.)

Section 3 simply confirms the claim of the city of New Orleans to specified commons, upon certain conditions.

Section 4 gives the commissioners power "to decide, according to the laws and established usages and customs of the French and Spanish Governments, upon all claims to lands within their respective districts," where the claim is made by any person who was an inhabitant of Louisiana on the 20th day of December, 1803, "and for a tract not exceeding the quantity of acres in a league square," which shall not include a lead mine or salt spring. The decision of the commissioners in favor of the claimant is made final. (*Ib.*)

"SEC. 5. *And be it further enacted*, That the time fixed by the act above mentioned and by the acts supplementary to the same, for delivering to the proper register or

recorder notices in writing and the written evidences of claims to land, be, and the same is hereby, extended for the Territories of Orleans and Louisiana till the first day of July, one thousand eight hundred and eight, and persons delivering such notices and evidences shall be entitled to the same benefit as if the same had been delivered within the time limited by the former acts; but the rights of such persons as shall neglect so doing within the time limited by this act shall, so far as they are derived from or founded on any act of Congress, ever after be barred and become void, and the evidences of their claims never after admitted as evidence in any court of law or equity whatever.

"SEC. 6. *And be it further enacted*, That the commissioners appointed or to be appointed for the purpose of ascertaining the rights of persons claiming lands in the Territories of Orleans and Louisiana shall respectively transmit to the Secretary of the Treasury and to the surveyor-general transcripts of the final decisions made in favor of claimants by virtue of this act, and they shall deliver to the party a certificate stating the circumstances of the case, and that he is entitled to a patent for the tract of land therein designated, which certificate shall be filed with the proper register or recorder within twelve months after date. And the register or recorder shall thereupon (a plat of the tract of land therein designated being previously filed with him or transmitted to him by the officer acting as surveyor-general in the manner hereinafter provided) issue a certificate in favor of the party, which certificate being transmitted to the Secretary of the Treasury, shall entitle the party to a patent, to be issued in like manner as is provided by law for the issuing of patents for public lands lying in other Territories of the United States.

"SEC. 7. *And be it further enacted*, That the tracts of land thus granted by the commissioners shall be surveyed at the expense of the parties, under the direction of the surveyor-general, or officer acting as surveyor-general, in all cases where an authenticated plat of the land as surveyed under the authority of the officer act-

ing as surveyor-general under the French, Spanish, or American Governments respectively, during the time either of the said governments had the actual possession of the said Territories of Orleans and Louisiana, shall not have been filed with the proper register or recorder, or shall not appear of record on the public records of the said Territories of Orleans and Louisiana. The said commissioners shall also be authorized, whenever they may think it necessary, to direct the surveyor-general, or officer acting as such, to cause any tract of land already duly surveyed, to be resurveyed at the expense of the United States. And the surveyor-general, or officer acting as such, shall transmit general and particular plats of the tracts of land thus surveyed to the proper register or recorder, and shall also transmit copies of the said plats to the Secretary of the Treasury.

"SEC. 8. *And be it further enacted*, That the commissioners aforesaid shall respectively report to the Secretary of the Treasury their opinion on all the claims to land within their respective districts, which they shall not have finally confirmed by the fourth section of this act. The claims shall, in the said report or reports, be arranged into three general classes, that is to say: first, claims which, in the opinion of the commissioners, ought to be confirmed in conformity with the provisions of the several acts of Congress, for ascertaining and adjusting the titles and claims to land within the Territories of Orleans and Louisiana; secondly, claims which, though not embraced by the provisions of the said acts, ought nevertheless in the opinion of the commissioners to be confirmed in conformity with the laws, usages, and customs of the Spanish Government; thirdly, claims which neither are embraced by the provisions of the said acts, nor ought in the opinion of the commissioners to be confirmed in conformity with the laws, usages, and customs of the Spanish Government; and the said report and reports being in other respects made in conformity with the forms prescribed according to law by the Secretary of the Treasury, shall by him be laid before Congress, for their final determination thereon, in the man-

ner and at the time heretofore prescribed by law for that purpose." (2 Stats., 441, 442.)

The ninth section of the act of March 3, 1811, established a land office "for the disposal of the lands of the United States lying in the Territory of Louisiana"; while the proviso to the next section (10) declared "that, till after the decision of Congress thereon, no tract of land shall be offered for sale the claim to which has been, in due time and according to law, presented to the recorder of land titles in the district of Louisiana, and filed in his office for the purpose of being investigated by the commissioners for ascertaining the rights of persons claiming lands in the Territory of Louisiana." (2 Stats., 665.)

An act approved on the 15th of the preceding month also contained the same provision. (Act of February 15, 1811, § 10, proviso, 2 Stats., 621.)

Upon the last day of April, 1812, the State of Louisiana became a member of the Union by act approved on the 8th day of that month (2 Stats., 701). The rest of what had been Louisiana Territory became the Territory of Missouri, June 4, 1812. (*Id.*, 743.) On the 13th day of the same month Congress passed "An act making further provision for settling the claims to land in the Territory of Missouri." (2 Stats., 748 to 752). Its first section confirmed to certain towns and villages their lots and commons; from which, by the next section, a reserve for school purposes was made. The third section declares "that every claim to a donation of lands in the said Territory, in virtue of settlement and cultivation, which is embraced by the report of the commissioners transmitted to the Secretary of the Treasury, and which, by the said report, shall appear not to have been confirmed merely because permission, by the proper Spanish authority, to

settle has not been duly proven; or because the tract claimed, although inhabited, was not cultivated on the 20th December, 1803; or not to have been confirmed on account of both said causes; the same shall be confirmed, in case it shall appear that the tract so claimed was inhabited by the claimant, or some one for his use, prior to the 20th December, 1803, as aforesaid, and cultivated in eight months thereafter; subject, however, to every other limitation and restriction prescribed by former laws in respect to such claims; and in all cases where it shall appear by the said report or other records of the board that claims to land have not been confirmed, merely on the ground that the claim was for a greater quantity than eight hundred arpens, French measure, every such claim, to the extent of eight hundred arpens, shall be confirmed." (2 Stats., 750.)

The next section requires the recorder of land-titles to transmit to the Commissioner of the General Land Office a statement of the tracts confirmed by section 3, and to furnish the deputy surveyor a description of such tracts, with quantity, locality, boundaries, and connection, &c. (*Ib.*) The fifth section provides for a survey of so much of the territory as the President may think expedient into townships six miles square. (*Ib.*)

The sixth requires the recorder to furnish the deputy surveyor with data from which to make survey of claims confirmed. (*Id.*, 751.)

Section 7 allows "actual settlers on the lands they claim, whose claims have not been heretofore filed with the recorder of land-titles for said Territory," until the 1st of December, 1812, "to deliver notices in writing and the written evidences of their claims to the said recorder," who shall record them the same as if delivered before

July 1, 1808; "but the rights of such persons as shall neglect so doing within the time limited by this act shall, so far as they are derived from or founded on any act of Congress, ever after be barred and become void, and the evidences of their claims never after admitted as evidence in any court of the United States against any grant derived from the United States." (*Ib.*)

The last section (8) gives the recorder the same power as to claims filed under this act "and the claims which have been heretofore filed but not decided on by the commissioners, as the board of commissioners had by former laws respecting claims filed prior to July 1, 1808, except that all of his decisions shall be subject to the revision of Congress." And it is made the duty of the recorder to report all such claims, with the substance of the evidence in relation to them and his opinion and remarks thereon, to be laid before Congress. (*Id.*, 752.)

March 3, 1813, was approved an act to allow persons who had filed notice of claim to lands in Missouri with the recorder of land-titles to produce the written evidence or other testimony in support thereof at any time before January 1, 1814; and, if not so done, the claim was to be forever barred, so far as derived from the United States. (2 Stats., 812 to 815.) The recorder was to make report, similar to that required in other such statutes, for Congressional action. (*Ib.*)

By act of August 2, 1813, actual settlers on lands in the district of Arkansaw [*sic*], in the Territory of Missouri, were allowed till January 1, 1814, to file notice and evidence of their claims, report thereon to be made by the recorder to the Commissioner of the General Land Office, with opinion and remarks, &c., to be transmitted to Congress. (3 Stats., 86, 87.)

In 1814, April 12, Congress passed "An act for the final adjustment of land-titles in the State of Louisiana and Territory of Missouri." (3 Stats., 121–123.) The first section confirms the claim of every person claiming lands in that country by virtue of any *incomplete* French or Spanish grant or concession, or any warrant or order of survey for lands in Missouri Territory granted prior to March 10, 1804, where the claimant was then resident in Louisiana, or at the time the concession, warrant, or order of survey was granted was so resident, and whose claim had been filed with the proper register or recorder of land-titles according to law, and embraced in the report of the commissioners, register, or recorder, if it appeared by such report that the concession, warrant, or order of survey contained a special location or had been actually surveyed and located by an authorized surveyor in Missouri before March 10, 1804: "*Provided*, That no claim shall be confirmed by this section which shall have been adjudged by either of the boards of commissioners, or a register or receiver of public moneys, or a recorder acting as such, to be antedated or otherwise fraudulent;" nor shall more than a square league be confirmed to one person, &c. (*Ib.*) The second section confirms claims which had been previously rejected by the commissioners, &c., upon the sole ground that the tracts were not inhabited December 20, 1803, provided that in every other respect the claims were in compliance with the provisions and restrictions of former laws. (*Id.*, 122.)

Section 3 directs the register to cause these confirmed claims to be surveyed, &c. (*Ib.*)

Congress passed an act, approved May 26, 1824, entitled "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkan-

sas to institute proceedings to try the validity of their claims." (4 Stats., 52 to 56.) By this statute it was enacted, in its first seven sections, as follows:

"SEC. 1. That it shall and may be lawful for any person or persons, or their legal representatives, claiming lands, tenements, or hereditaments, in that part of the late Province of Louisiana which is now included within the State of Missouri, by virtue of any French or Spanish grant, concession, warrant, or order of survey, legally made, granted, or issued before the tenth day of March, one thousand eight hundred and four, by the proper authorities, to any person or persons resident in the Province of Louisiana at the date thereof, or on or before the tenth day of March, one thousand eight hundred and four, and which was protected or secured by the treaty between the United States of America and the French Republic, of the thirtieth day of April, one thousand eight hundred and three, and which might have been perfected into a complete *title* under and in conformity to the laws, usages, and customs of the government under which the same originated had not the sovereignty of the country been transferred to the United States, in each and every such case, it shall and may be lawful for such person or persons, or their legal representatives, to present a petition from the district court of the State of Missouri setting forth fully, plainly, and substantially the nature of his, her, or their claim to the lands, tenements, or hereditaments, and particularly stating the date of the grant, concession, warrant, or order of survey under which they claim, the name or names of any person or persons claiming the same, or any part thereof, by a different title from that of the petitioner, or holding possession of any part thereof, otherwise than by the lease or permission of the petitioner; and also if the United States be interested on account of the lands within the limits of such claim not claimed by any other person than the petitioner; also, the quantity claimed, and the boundaries thereof, when the same may have been designated by boundaries; by whom issued, and

whether the said claim has been submitted to the examination of either of the tribunals which have been constituted by law for the adjustment of land-titles in the present limits of the State of Missouri, and by them reported on unfavorably or recommended for confirmation; praying, in said petition, that the validity of such title or claim may be inquired into and decided by the said court; and the said court is hereby authorized and required to hold and exercise jurisdiction of every petition presented in conformity with the provisions of this act, and to hear and determine the same on the petition, in case no answer or answers be filed after due notice; or on the petition, and the answer or answers of any person or persons interested in preventing any claim from being established; and the answer of the district attorney of the United States, where he may have filed an answer, according to the evidence which shall be adduced by the petitioner, by any person interested in preventing the decree of the court in favor of the title of the petitioner or petitioners, and by the United States, and in conformity with the principles of justice and according to the laws and ordinances of the government under which the claim originated; and the copy of such petition, with a citation to any adverse possessor or claimant, shall be served on such possessor or claimant in the ordinary legal manner of serving such process in the State of Missouri, at least fifteen days before the term of the district court of the United States to which the same is made returnable, and, in like manner, on the district attorney of the United States, where the government is interested in the defense; and it shall be the duty of the United States attorney for the district in which the suit shall be instituted, in all cases where the United States are interested on account of the public domain, to take notice of each petition filed under the provisions of this act in the said district, and to make defense, on all just and proper occasions, in behalf of the public interest.

"SEC. 2. *And be it further enacted*, That every petition which shall be presented under the provisions of this act shall be conducted according to the rules of a court

of equity, except that the answer of the district attorney of the United States shall not be required to be verified by his oath, and tried, without any continuance, unless for cause shown; and the said court shall have full power and authority to hear and determine all questions arising in said cause relative to the title of the claimants, the extent, locality, and boundaries of the said claim, or other matters connected therewith, fit and proper to be heard and determined, and, by a final decree, to settle and determine the question of the validity of the title, according to the law of nations, the stipulations of any treaty, and proceedings under the same; the several acts of Congress in relation thereto, and the laws and ordinances of the government from which it is alleged to have been derived, and all other questions properly arising between the claimants and the United States; which decree shall, in all cases, refer to the treaty, law, [or] ordinance under which it is confirmed or decreed against; and the court may, at its discretion, order disputed facts to be found by a jury according to the regulations and practice of the said court, when directing issues in chancery before the same court; and, in all cases, the party against whom the judgment or decree of the said district court may be finally given shall be entitled to an appeal, within one year from the time of its rendition, to the Supreme Court of the United States, the decision of which court shall be final and conclusive between the parties; and, should no appeal be taken, the judgment or decree of the said district court shall, in like manner, be final and conclusive.

"SEC. 3. *And be it further enacted*, That the evidence which has been received by the different tribunals which have been constituted and appointed by law to receive such evidence, and to report the same to the Secretary of [the] Treasury, or to the Commissioner of the General Land Office, upon all claims presented to them respectively, shall be received and admitted in evidence for or against the United States, in all trials under this act, when the person testifying is dead or beyond the reach of the court's process; together with such other testi-

mony as it may be in the power of the petitioner, the person or persons interested in the defense made against establishing any claim, or the United States attorney, to produce, and which shall be admissible according to the rules of evidence and the principles of law.

"SEC. 4. *And be it further enacted*, That in all cases in which evidence shall be offered by the petitioner, which has not been received by either of the tribunals constituted by law for that purpose, it shall be the duty of the attorney of the United States for the district in which the suit shall be instituted, or any person interested in the defense may examine, or cause to be examined, the witnesses, whether examined in court or by commission under the authority thereof; and it shall be the duty of the Commissioner of the General Land Office of the United States, or the keeper of any public records, who may have possession of the records and evidence of the different tribunals, which have been constituted by law for the adjustment of land-titles in Missouri, as held by France, upon the application of any person or persons whose claim to lands has been rejected by such tribunals, or either of them, or on the application of any person interested, or by the attorney of the United States for the district of Missouri, to furnish copies of such evidence, certified under his official signature, with the seal of office thereto annexed, if there be a seal of office.

"SEC. 5. *And be it further enacted*, That any claim to lands, tenements, or hereditaments, within the purview of this act, which shall not be brought by petition before the said courts within two years from the passing of this act, or which, after being brought before the said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred, both at law and [in] equity, and no other action, at common law, or proceeding in equity, shall ever thereafter be sustained in any court whatever in relation to said claims.

"SEC. 6. *And be it further enacted*, That upon the final decision of any claim prosecuted under this act, in favor of the claimant or claimants, it shall and may be lawful

for such claimant to demand and receive from the clerk of the court in which such final decision is had a copy of the decree, in his, her, or their favor, under the official signature of the clerk, and the seal of the court, if any seal belong to it, and deliver the same to the surveyor of public lands for the State of Missouri, who shall thereupon cause the land specified in said decree to be surveyed at the expense of the party; and duplicate plats and certificates of the survey so made to be returned into his office, one of which shall remain in said office, and the other, authenticated by the attestation and official signature of the surveyor of public lands, shall be delivered, on demand, to the party interested therein, and the same being presented to the Commissioner of General Land Office, in Washington City, shall entitle the party interested to a patent from the President of the United States.

"SEC. 7. *And be it further enacted*, That in each and every case in which any claim, tried under the provisions of this act, shall be finally decided against the claimant, and in each and every case in which any claim cognizable under the terms of this act shall be barred by virtue of any of the provisions contained therein, the land specified in such claim shall forthwith be held and taken as a part of the public lands of the United States, subject to the same disposition as any other public land in the same district." (4 Stats., 52 to 54.)

The succeeding sections, to the fourteenth, merely indicate the method of procedure. Section 14 extends the provisions of the act to the Territory of Arkansas, and gives jurisdiction of such claims to the superior court of that territory, with similar methods of procedure.

The last section (15) confines the operation of the preceding one to claims of not more than one league square.

This act was revived and continued in force for five years from June 17, 1844, by act of that date. (5 Stats., 676.)

The time for filing petitions under the above-recited statute was extended to May 26, 1829, and for rendering decisions thereon to May 26, 1830, by act of May 24, 1828, which further declares, in its first section, "and the courts having cognizance of said claims shall decide upon and confirm such as would have been confirmed under the laws, usages, and customs of the Spanish Government" for two years from May 26, 1828; "and all the claims authorized by that act to be heard and decided shall be ratified and confirmed to the same extent that the same would be valid if the country in which they lie had remained under the dominion of the sovereignty in which said claim originated." (4 Stats., 298.)

The act of May 8, 1830, further continued in force that of May 26, 1824, "so far as the said act relates to the claims within the territory of Arkansas," until July 1, 1831, "for the purpose of enabling the court in Arkansas, having cognizance of claims under the said act, to proceed by bills of review, filed or to be filed in the said court, on the part of the United States, for the purpose of revising all or any of the decrees of the said court in cases where it shall appear to the said court, or be alleged in such bills of review, that the jurisdiction of the same was assumed, in any case, on any forged warrant, concession, grant, order of survey, or other evidence of title; and in every case where it shall appear to the said court, on the prosecution of any such bill of review, that such warrant, concession, grant, order of survey, or other evidence of title is a forgery, it shall be lawful, and the said court is hereby authorized to proceed, by further order and decree, to reverse and annul any prior decree or adjudication upon such claim; and thereupon such prior decree or adjudication shall be deemed and held in

all places whatever to be null and void, to all intents and purposes." The court to establish rules of procedure upon such bills of review. (*Id.*, 399, 400.)

The second section suspends all entries of land in Arkansas until further direction of Congress. (*Ib.*)

The third section enacts:

"That no patent shall be issued for lands under any decree of the said court in any case in which the original warrant, concession, grant, or order of survey has been withdrawn from the files of the said court, unless the person or persons claiming such patent shall first produce and deposit in the office of the Commissioner of the General Land Office the *original* warrant, concession, grant, or order of survey on which such decree was founded and on which the said court took jurisdiction under the said act; and no patent shall be issued until the further order of Congress, in any case, under the said act, until it shall satisfactorily appear to the Commissioner of the General Land Office that the warrant, concession, grant, or order of survey, on which any lands are claimed, under any decree of the said court, was, in fact, made or issued by or under the authority of the person or persons purporting to have made or issued the same, or unless the said warrant, concession, grant, or order of survey shall have been determined by the said court, on the hearing of a bill of review, to be genuine.

"SEC. 4. *And be it further enacted*, That no entry, survey, or patent, shall, at any time hereafter, be made or issued under the said act, except in the name of the original party to any such decree, and on proof to the satisfaction of the officers, respectively, that the party applying is such original party, or is duly authorized by such original party, or his heirs, to make, receive, or require such entry, patent, or survey.

"SEC. 5. *And be it further enacted*, That in all cases in which the said court shall, by decree or adjudication under this act, review and annul any prior decree or adjudication therein, any lands which may have been

heretofore entered under any such prior decree or adjudication shall, thereafter, be subject to sale or entry as other public lands of the United States may be." (4 Stats., 400.)

The 6th section authorizes the employment of counsel to aid the district attorney.

The seventh gives to the losing party an appeal to the Supreme Court, to be taken within one year from the rendition of judgment; "which court shall have power to review the decision of the court below, both on the law and the facts; and the court in Arkansas is required to spread upon the record the whole testimony, together with the reasons for their decision in each case, and to transmit to the Supreme Court of the United States the same, together with the *original* warrant, concession, grant, order of survey, or other evidence of title." (*Id.*, 401.)

By the act of July 9, 1832, it is made—

"The duty of the recorder of land-titles in the State of Missouri, and two commissioners to be appointed by the President of the United States, by and with the advice and consent of the Senate, to examine all the unconfirmed claims to land in that State, heretofore filed in the office of the said recorder, according to law, founded upon any incomplete grant, concession, warrant, or order of survey issued by the authority of France or Spain prior to the tenth day of March, one thousand eight hundred and four; and to class the same so as to show, first, what claims, in their opinion, would in fact have been confirmed, according to the laws, usages, and customs of the Spanish Government, and the practice of the Spanish authorities under them, at New Orleans, if the government under which said claims originated had continued in Missouri; and, secondly, what claims, in their opinion, are destitute of merit, in law or equity,

under such laws, usages, customs, and practice of the Spanish authorities aforesaid; and shall, also, assign their reasons for the opinions so to be given. And in examining and classing such claims, the recorder and commissioners shall take into consideration, as well the testimony heretofore taken by the boards of commissioners and recorder of land-titles upon those claims, as such other testimony as may be admissible under the rules heretofore existing for taking such testimony before said boards and recorder; and all such testimony shall be taken within twelve months after the passage of this act.

"SEC. 2. *And be it further enacted*, That the office of the recorder shall be open for the purposes of such examination for the term of two years from the date of the organization of the board of commissioners and no longer; and the recorder and commissioners shall proceed in the examination in a summary manner, with or without any new application of the claimants; and shall, at the commencement of each session of Congress during said term of examination, lay before the Commissioner of the General Land Office a report of the claims so classed, stating therein the date and quantity of each, whether there be any, and what, conflicting claims, and the evidence upon which each claim depends, and the authority and power under which the said claim was granted by the Spanish or French governor, commandant, or subdelegate, to be laid before Congress for their final decision upon the claims contained in such first class. (4 Stats., 565 to 567.)

The third section provides for a sale of lands coming into the second class, under section 1, and a reservation of those coming into the first class until Congressional action thereon; with a proviso allowing actual settlers upon rejected claims the privilege of pre-empting not over 640 acres, upon waiving all other claim. (*Id.*, 567.)

Section 4 fixes official salaries.

Section 5 provides "that it shall be lawful for the heirs of Carlos de Vilemont to submit the evidence of their claim to a tract of land in Arkansas Territory, to be reported upon by the commissioners as they do upon other claims under this act. (*Ib.*)

This was a *complete* grant, subject to a condition of building a road, &c. (DeVilemont *vs.* United States, 13 Howard, 266.)

On the 2d of March, 1833, the provisions of the foregoing statute were "extended to embrace in its operations every claim to a donation of land in the State of Missouri, held in virtue of settlement and cultivation"; which were to be passed upon by the commissioners in conformity with pre-existing laws, and two years from March 2, 1833, were allowed for taking testimony. (4 Stats., 661, 662.)

The decisions of the recorder in favor of claimants to land in Missouri were confirmed by the first section of the act of July 4, 1836, excepting those of about thirty persons named, the first mentioned being Carlos D. Vilemont. The other sections provided for locating the patents to be issued. (5 Stats., 126, 127.)

The before-quoted act of May 26, 1824 (*ante* pp. 17 to 21), was continued in force as to Missouri, and the State (not Territory) of Arkansas and Louisiana, by act of June 17, 1844, for five years from that date. (5 Stats., 676.)

As the act of June 22, 1860, is that under which the present petitions were filed, it is copied *verbatim* in full. It is entitled—

"AN ACT for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person or persons, and the legal representatives of any person or persons, who claim any lands lying within the States of Florida, Louisiana, or Missouri, by virtue of grant, concession, order of survey, permission to settle, or other written evidence of title emanating from any foreign government, bearing date prior to the cession to the United States of the territory out of which said States were formed, or during the period when any such government claimed sovereignty or had the actual possession of the district or territory in which the lands so claimed are situated, shall be, and they are hereby, authorized to make application for the confirmation of their title to the lands so claimed, in the manner following, to wit: they shall file notices in writing, together with the evidence in support of their claims before the commissioners hereinafter designated, within whose district the lands claimed may be situated, together with a brief abstract of the title of the claimant and copies of the plats of survey thereof, whenever such surveys have been made and are within possession of the claimant, and accompanied with a sworn statement by the claimant of the lands supposed to be covered by his claim according to the legal divisions and subdivisions of the survey made by the United States, if the land claimed is included in any survey so made; and the said notices, evidence, and the decisions of the commissioners thereon, shall be recorded in a book kept for that purpose, a transcript of which shall from time to time be transmitted to the Commissioner of the General Land Office.

"SEC. 2. *And be it further enacted*, That the registers and receivers of the several land offices of Florida and Louisiana, within their respective land districts, and the recorder of land titles for the city of Saint Louis, for the State of Missouri, and their successors in office, shall be, and they are hereby, appointed commissioners to hear and decide, under such instructions as may be prescribed by the Commissioner of the General Land Office in conformity with this act and according to justice and equity and the principles hereinafter established, in a summary manner, all matters respecting such claims within the districts aforesaid as come within the provisions of this act; they shall have power to administer oaths, compel the attendance of and examine witnesses, demand and obtain from the proper officers all public records in which grants of land, warrants, orders of survey, or other evidence of claims to land derived from any foreign government may have been recorded, and shall make a report to the Commissioner of the General Land Office on the claims so presented to them for decision, dividing said claims into separate classes in the manner hereinafter provided, and giving their opinion whether such claims ought to be confirmed or rejected.

"SEC. 3. *And be it further enacted*, That the claims so presented and passed upon by the commissioners as aforesaid, shall be by them divided in their report into three distinct classes, as follows, viz:

"Number one shall contain all claims which, in their opinion, ought to be confirmed, where the lands claimed have been in possession and cultivation by the private claimants or those under whom they derive title for a period of at least twenty years preceding the date of filing the claim, by virtue of some grant, concession, or order of survey, permission to settle, or other written evidence of title emanating from some foreign government which held or claimed sovereignty or jurisdiction over the territory in which the lands claimed are situated, and where the title emanating from such foreign government bears date anterior to the cession of said territory to the United States.

"Number two shall contain all claims which, in their opinion, ought to be confirmed, where the lands are claimed under written evidence of title, as above provided in class number one, but where there has been no actual possession and cultivation of the land claimed for a period of at least twenty years prior to the filing of the claim.

"Number three shall contain all claims which, in their opinion, ought to be rejected, whether from defect of proof, suspicion of fraud based on probable ground, uncertainty of location, vagueness of description, or any other cause sufficient, in their opinion, to justify such rejection: *Provided*, That in no case shall such commissioners embrace in said classes number one and number two any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means; nor shall any such claim be received or considered by the commissioners which has been already twice rejected on the merits by previous boards.

"SEC. 4. *And be it further enacted*, That whenever the said Commissioner shall approve the report of the commissioners in cases embraced in classes number one or number two, he shall report the same to Congress for its action; and whenever the said Commissioner shall approve the report in cases embraced in class number three, the rejection of the claim so acted on shall be final and conclusive, and the land embraced within the claim shall be considered and treated as other public lands belonging to the United States.

"SEC. 5. *And be it further enacted*, That all claims comprehended within any of the three classes aforesaid, on which there shall be disapproval by the Commissioner of the report made by the boards of commissioners aforesaid, shall be reported to Congress for its action and final decision thereon.

"SEC. 6. *And be it further enacted*, That whenever it shall appear that lands claimed, and the title to which may

be confirmed under the provisions of this act, have been sold in whole or in part by the United States prior to such confirmation, or where the surveyor-general of the district shall ascertain that the same cannot be surveyed and located, the party in whose favor the title is confirmed shall have the right to enter upon any of the public lands of the United States a quantity of land equal in extent to that sold by the government: *Provided*, That said entry be made only on lands subject to private entry at one dollar and twenty-five cents per acre, and as far as may be possible in legal divisions and subdivisions, according to the surveys made by the United States.

"SEC. 7. *And be it further enacted*, That whenever any claim is presented for confirmation under the provisions of this act, which has heretofore been presented before any board of commissioners under authority of Congress, the facts reported as proven by the former board shall be taken as true *prima facie*; and the evidence offered before such former board, and remaining of record, shall be admitted on the examination of the claims made under the provisions of this act.

"SEC. 8. *And be it further enacted*, That no land claimed under the provisions of this act shall be offered for sale, or otherwise disposed of by the officers of the United States, until the final decision shall be made on the validity of such claim; and in no case where land is possessed or cultivated by private persons shall it be entered upon or surveyed as public land, or offered for sale, without previous notice given to those in possession, requiring them to present their claims for confirmation; and if within sixty days from the date of such notice such claim shall not have been filed, then the proper officers of the government may proceed to the survey or sale of such lands, as public lands, without prejudice, however, to the legal rights of the possessor or claimant, if any he have.

"SEC. 9. *And be it further enacted*, That before the boards of commissioners shall be required to receive for record any notice, paper, evidence of title, or testimony

in support of any claim, the claimant shall pay to said board the sum of twenty-five cents for every hundred words required to be recorded, which shall be in full consideration for the recording and the transcript required to be forwarded to the Commissioner of the General Land Office.

"SEC. 10. *And be it further enacted*, That at the commencement of each regular session of Congress it shall be the duty of the Commissioner of the General Land Office to make report of all that has been done under the provisions of this act by the several officers charged with its execution.

"SEC. 11. *And be it further enacted*, That in any case of such a claim to lands as is hereinbefore in the first section of this act mentioned, where the lands claimed have not been in possession of and cultivated by the original claimant or claimants, or those holding title under him or them, for the period of twenty years aforesaid, and where such lands are claimed by complete grant or concession, or order of survey duly executed, or by other mode of investiture of the title thereto in the original claimant or claimants, by separation thereof from the mass of the public domain, either by actual survey or definition of fixed natural and ascertainable boundaries or initial points, courses, and distances, by the competent authority prior to the cession to the United States of the territory in which said lands were included, or where such title was created and perfected during the period while the foreign governments from which it emanated claimed sovereignty over or had the actual possession of such territory, the person or persons, his, her, or their heirs, devisees, legal representatives, or grantees so claiming such lands may at their option, instead of submitting their claim to the officer or officers hereinbefore mentioned, proceed by petition in any district court of the United States within whose jurisdiction the lands, or any part of the lands, claimed may lie, unless such claim comes within the purview of the third section of this act; to which petition the United States shall be made defendant, and it shall be verified by the oath of

the party or parties, and conform to the provisions of section 1 of this act, and to the practice of such court in chancery, and the attorney of the United States for such district shall defend against the same for the United States; and the court shall decide the claim valid or invalid, according to the principles established in this act, and decree accordingly. If the decree be against the United States, an appeal shall be entered to the Supreme Court of the United States, and if it be against the claimant or claimants, he or they may take an appeal directly to that court, as of right and course, without affidavit or security other than for costs; and the same shall be adjudged *de novo* in the Supreme Court as in other cases of appeals thereto in chancery, and as equity and justice *and the principles aforesaid* may require; which decision shall be final, and patent shall thereupon issue, if the claim be adjudged valid, for so much of the lands claimed as remain unsold; and for so much as may have been sold, the provisions of section 6 of this act shall apply and be in force.

"SEC. 12. *And be it further enacted*, That this act shall be and remain in force during the term of five years, unless sooner repealed by Congress; and all claims presented or sued upon, according to the provisions of this act, within the said term of five years, may be prosecuted to final determination and decision, notwithstanding the said term of five years may have expired before such final determination and decision."

(Approved, June 22, 1860. 12 Stats., 85 to 88.)

It was enacted June 10, 1872, that the provisions of the foregoing act of June 22, 1860, should be extended and continue in force for three years, *i. e.*, until June 10, 1875, it having already been extended for three years by the act of March 2, 1867, c. 184, 14 Stats., 544, bottom. A second section provides that all persons claiming under the first section of the act of June 22, 1860, may have their claims confirmed upon proof that they

and those from whom title is derived have held continuous possession of the land from the date of cession to the United States. (17 Stats., 378, 379.)

Three weeks before the eleven years allowed by these last-mentioned statutes expired, and three weeks before the completion of the eighty-second year after the grant set up is said to have issued, the petitioners apply to the court by the original petition in the present case!

RULE OF DECISION.

The eleventh section of the act of June 22, 1860 (*ante*, p. 32, top), required the verified petition of the claimants to "conform to the provisions of section 1 of this act, and to the practice of such court in chancery; * * * and the court shall decide the claim valid or invalid *according to the principles established in this act*, and decree accordingly." Upon appeal "the same shall be adjudged *de novo* in the Supreme Court as in other cases of appeals thereto in chancery, and as equity and justice *and the principles aforesaid* may require." (12 Stat., 88; U. S. *vs.* Lynde, 11 Wall., 647.)

The second section (*ante*, p. 28) required the commissioners to hear and decide the cases, under instructions from the Commissioner of the General Land Office, "in conformity with the provisions of this act and according to justice and equity and the principles *hereinafter* established."

The "*principles*" which are to guide this court (in addition to those governing the ordinary course of chancery procedure) must be found, then, somewhere between the second and eleventh sections of this act.

A glance through the statute will show that it is only in the *third* section that these special "principles" are to be found; where claims are divided into three classes, viz, (1) those which ought to be confirmed, of which the claimants have been in possession, cultivating them, for twenty years next prior to the filing of the petition; (2) those which ought to be confirmed although the parties have not been *thus* in possession; and (3) those which "ought to be rejected, whether from *defect of proof*, *suspicion of fraud* based on probable ground, *uncertainty of location*, *vagueness of description*, or *any other cause sufficient*, in their opinion, to justify their rejection."

It will be recollected that this appeal is also to be here heard, under that statute, § 11, "*as in other cases of appeals thereto in chancery* and as equity and justice *and* the principles aforesaid may require."

"These principles are to be applied to each particular case." (United States *vs.* Lynde, 11 Wall., 647, near top.)

What, then, is the effect in chancery procedure of a demurrer to the bill, such as was filed in this case to the second amended petition, the petition having been twice amended and thrice demurred to? (Record, 45 to 47.)

"A demurrer is an allegation of a defendant which, admitting the matters of fact alleged by the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer; or that for some reason on the face of the bill, or because of the omission of some matter that ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer. It therefore demands the judgment of the court whether

the defendant shall be compelled to make answer to the plaintiff's bill." (Milfd. Pl., 108; 1 Daniell's Ch. Prac., 543; 1 Barbour's Ch. Prac., 106.)

It does not admit all the facts stated in the bill; but only, for the purposes of the argument, those that are *well pleaded*. (Commercial Bank *v.* Buckner, 20 Howard, 125, last paragraph of opinion; authorities, *passim*.)

As will be shown more specifically in the course of the argument, the demurrer does not admit a broad statement, which is repugnant to the detailed circumstances; nor one which antagonizes those facts, historical and other, of which the court takes judicial notice; nor, in short, anything which the whole context of the bill and the nature of those things judicially known show not to have been well pleaded.

It had been supposed that R. S. sec. 954, to which counsel refer (Brief, 5, 6.), had reference only to suits at law, and did not abridge the right to assign additional grounds of demurrer, *ore tenus*, in equity causes. However this may be, it is clear that the thirteenth rule of this court (also cited in their Brief, page 6) has no application to exhibits attached to a bill in equity to which a demurrer has been filed. That stands according to long-established principles. These exhibits are not "found in the record as evidence," within the meaning of that rule. The demurrer is, of itself, a legal objection to so much of them as is not well pleaded. The government has, as yet, had neither occasion nor opportunity to object to their "admissibility" as evidence, since the time for taking and filing testimony has not arrived.

APPLICATION OF FOREGOING PRINCIPLES TO THIS PETITION.

I.

The third article of the second amended petition (Record, 29, 30) contains a statement which (according to the propositions of law above mentioned) is *not* admitted by the demurrer, because repugnant to the paper copied into that article and to the contents of the exhibit recited in the next (fourth) article of the bill. (Dillon *v.* Barnard, 21 Wall., 430, and 1 Holmes, 386.) The statement is that Baron de Carondelet, on the 11th June, 1793, made an order of survey, &c., and duly delivered the same to the royal surveyor, Trudeau (Record, 29); which order of survey, so called, is then recited at the top of page 30; and it plainly appears *not to be an order of survey at all.* It is addressed to no one, and does not bear the date mentioned (at the bottom of page 30) as being upon the one there said to have been given by the governor to the surveyor. Now, filing a demurrer to the bill does not admit the truth of the statement that this paper is an order of survey. It is improperly pleaded as such an order. In Lea *v.* Robeson (12 Gray, 285), it was said by Shaw, C. J.: "All the facts well pleaded in a bill are admitted by demurrer. But if a party sets forth an agreement in writing and all the circumstances to give it proper and legal effect, and then avers that he did not assign by that agreement certain things which might or might not be within it, it is the averment of a conclusion of law from the agreement; or it alleges another and parol agreement inconsistent and incompatible with the written agreement, which it would not be competent

to control by parol evidence; and in either case the defendant may safely demur." See also the succeeding paragraph, at the top of page 286, volume 12 of Gray's reports.

Where a bill alleged as a fact that a check was paid and then proceeded to detail the manner and circumstances of its payment, and those circumstances did not establish the fact, it was held (upon demurrer) that the allegation of payment amounted to nothing. (Redmond *v.* Dickerson, 1 Stockton, N. J., Ch., 507.)

II.

Another objection, raised by the demurrer, and applicable to the several exhibits A, B, and C, may as well be here considered.

Articles XII and XIV of the bill (Record, 33) distinctly state that all the petitioner has to offer "as evidence" of the survey and grant are *copies* coming from the depositaries mentioned. The last-named article (Record, 33, bottom) says that "copies only of the same were given to said Valliere by said Carondelet and Trudeau, as was at that time the custom and law of the said province, which copies have been lost or destroyed," &c.

In reply to this statement we have to say—

First. That this court will now judicially take cognizance of the law which it is called to administer over this territory, to the government of which the United States has succeeded; and that it is not true in fact, nor a correct statement of that law, that copies only were then given to petitioners for grants by the Spanish authorities.

Referring to 5 Am. State Papers, 712 (Duff Green's edition, which is the one used throughout in making this argument), it will be found, on looking near the middle of the first column upon that page, that Pascal Cerré, in support of his claim, produced "the two *original* concessions," one dated October 12, 1782, and the other January 10, 1798, and proved the genuineness of every signature to the grants and to the surveys, &c. So as to Cerré's second claim. (*Id.*, 712.) The next claim was James Mackey's. He did not produce the concession, and his claim was rejected. The next was that of Saint Vrain. He produced his *original* concession, dated February 10, 1796, and proved the signature of Baron de Carondelet, and that the body of the paper was in the handwriting of his secretary. So as to the succeeding claims (pp. 717, 718, 720, *et seq.*). It is not worth while to make further citations. An inspection of the claims in this volume will demonstrate that it *was* the law and custom to deliver the orginal grant to the parties. Its non-production would suffice to reject a claim.

In Glenn *v.* United States (13 Howard, 256, top), this court states the practice as Delassus gives it: "He kept no books in which the fact was recorded; *all he did was to indorse his decree upon the petition and* RETURN *it to* THE PARTY *demanding the land*; and the party might hand it to the surveyor or retain it at his option. He believed the surveyor made a *note* of the concession of record; but whether before or after the survey was made, he knew not, as that matter did not concern the deponent" (Delassus).

The court then proceeds, in the opinion in that case, to say: "*Thus* it appears that Clamorgan got the paper title relied on *in the ordinary form*, and retained it in his

own hands until after Upper Louisiana was delivered to the United States in 1804." (13 Howard, 256.)

In the Winter case, Johnson, J., said: "The genuineness of the signature of the Baron de Carondelet to the concession has been, in my opinion, sufficiently proved by competent witnesses—those who are acquainted with his handwriting—so as to entitle it to be used in any court of justice." (1 Hempstead, 379. See also United States *v.* Arredondo, 6 Peters, 724, 725.) In Mitchell *v.* United States (9 Peters, 711, 731), reference is made to the *water-mark* upon the original document.

Stoddard tells us in his sketches that the intendant Morales issued his land laws July 17, 1799; that these laws were never carried into effect; but cost Morales his office, by reason of the popular clamor they aroused, being exclaimed against as extortionate and oppressive; "oppressive, not only *because the settler was deprived of his original papers*," but because all concessions were void unless forwarded for confirmation in six months. (Stoddard's Sketches, &c., 252.) Thus it will be seen that the innovation, in the summer of 1799, of not delivering the original papers to the petitioner excited a commotion before which the authorities had to succumb. In cases where an original final grant was retained, a duplicate original was delivered to the petitioner.

In many of the cases reported, several of which are hereinafter cited, with reference to the deraignment of title, it appears incidentally that the original was produced by the petitioner, and its authenticity established.

Attention is called in this connection to the language of the fourth section of the act of March 26, 1805 (2 Stats., 326, *ante*, p. 7, bottom); that every person claiming lands, &c., "shall deliver to the commissioner, for the

purpose of being recorded, every *grant*, order of survey, deed, conveyance, or other written evidence of his claim" * * * ; *Provided, however*, That where lands are claimed by virtue of a *complete* French, British, or Spanish grant, it shall not be necessary for the claimant to have any *other* evidence of his claim entered at large on the record *except the* ORIGINAL *grant* or patent, together with the order of survey, and the plat," &c. (See *ante*, pages 7 and 8.)

This phraseology is copied literally into the fourth section of the act of April 25, 1812 (2 Stats., 715), which is not printed in the preface to this argument, because confined to lands *east* of the Mississippi. The act approved May 8, 1830, declares, in its third section, that no patent shall issue "in any case in which the ORIGINAL warrant, concession, grant, or order of survey has been withdrawn from the files of said court," until the claimant shall file in the General Land Office "the *original* warrant, concession, grant, or order of survey"; and, further, that no patent should issue in any case until the Commissioner was satisfied of the *genuineness* of the document produced, or it had been established as the true original upon a bill of review expressly presenting that question for decision. (4 Stats., 400, *ante*, page 23.)

The seventh section of the same act requires the transmission of "the *original* warrant, concession, grant, order of survey, or other evidence of title" to this court, if the cause is brought here by appeal. (4 Stats., 401, *ante*, page 24.)

It is clear then that it was *not* the custom or law to give copies only of the grant to the petitioner, notwithstanding the statement of the bill. "When facts are

averred in a bill which are contrary to any fact of which the court takes judicial notice, the court will not pay any attention to the averment." (1 Daniel's, Ch. Proc., 18, 19, chap. ii, § 2; and 546, chap. xiv, § 1; Taylor *v.* Barclay, 2 Sim., 213, 220 to 223, especially this last page.)

Secondly. It being admitted by the bill and affidavit of Mr. Duryea thereto, that *copies* are all the claimants have to offer in support of the alleged grant, the objection is made that these copies are not competent to prove any fact. They purport to be *certified* copies, and if the record be not authorized, then the certification will not be, and it is as though no paper was offered. Record of an instrument not by law designed to be *so* recorded is a nullity. The books are full of such decisions. (Sigourney *v.* Larned, 10 Pick., 72; Blood *v.* Blood, 23 Pick., 80; DeWitt *v.* Moulton, 17 Me., 418; Brown *v.* Lunt, 37 Me., 423; 2 Taylor on Ev., § 1430; 1 Wharton on Ev., § 89.

These papers do not purport to come from the proper depositary, nor to be authenticated by the proper official. (Lavergne *v.* Elkins, 17 La., 227, 231.)

Referring, first, to the so-called "order of survey" and "survey," it will be noticed that the claimants profess to base the admissibility of these documents upon R. S., sec. 2225, which reads thus: "Any copy of a plat of survey, or transcript from the records of the office of surveyor-general of Louisiana, duly certified by him, shall be admitted as evidence in all the courts of the United States and the territories thereof."

The marginal reference to this section tells us that it is the act of March 3, 1831, which is reproduced. This created a *federal* office; and it is *such* official's certifica-

tion that is to be received. (4 Stats., 442, § 494, top.) See the quotation from 17 La. (O. S.), 227, on page 46, top, of this argument.

The papers above mentioned are only certified, as found by one John Ray, register of *State* land office, among the records of the late *State* surveyor-general. (Record, 41, folio 55.) L. Bringier was "*late surveyor-general of this State.*" The only certification (*Ib.*) is that of John Ray, register of the *State* land office, whom R. S., § 2225, does not mention.

Possibly the justice of this court assigned to the fifth circuit may see good reason why such a claim as is here presented should be founded upon the certification of John Ray! Stat nominis *umbra.* That circumstance casts a cloud upon the petitioner's title—a *ray* of darkness.

The counsel say their next piece of "evidence" is "a *copy* of the grant" of Carondelet to Valliere, "certified by the proper authorities at Havana (*at which place the original grant is on record*) and *authenticated* by the United States consul at that city." (Brief, 33, paragraph 6.)

This they declare (*Ib.*) to be "the highest available evidence of the authenticity of this grant" (so, of course, they can possess nothing better!), "for only copies of these grants were given to grantees, the originals remaining on record in the public archives." To support this repetition in their brief of what they had averred in their petition they cite Mitchell *v.* The United States (9 Peters, 725), where (as I have already noticed) the truth is the original papers, with the water-mark therein, were before the court. The "record" mentioned in the page (725) to which they refer is obviously the *court*

record. In the Percheman case, also cited by claimants, the decision was based on the fact, stated in the opinion, that "It appears *from the words of the grant* that the original was not in possession of the grantee." (7 Peters, 84.) Such is not the present case, nor was it the customary method of procedure, as we have hereinbefore shown, especially referring to the act of May 8, 1830, §§ 3 and 7, requiring proof of the *genuineness* of the grant, and the transmission of the original, with the papers, to this court upon appeal. (4 Stats., 400, 401.)

But this paper does not come from the proper depositary either.

Looking at the Spanish version, Exhibit C, page 36, of record, we find that it purports to be copied from the book of grants in *West Florida* in 1793. The court will take judicial cognizance of the fact that Missouri and Arkansas never were, under any dynasty, a part of West Florida. The book purports to contain *only* the titles issued by the governors of West Florida in that year. (Record, 36, *ubi sup.*) Not a word about "other provinces," though the framer of the bill uses these words. (Record, 32, line 8.) This is another instance in which the broad statement of the bill is contradicted by the document itself, as recited.

It is not true that Havana is, or ever was, the proper place for the records of the land-titles in Louisiana. That very report of Pintado's, to the conclusion of which (2 White's Recop., 362) counsel call attention, shows what the truth is. It shows that the records or notes (such as were made) remained in the provinces in which the land was situate. Near the top of page 341 this passage occurs: "Fourth. I have said that [of] the concessions and sales of land, without any exception, made by the *in-*

tendency of Louisiana and West Florida, *in that last province, from* 1799 *to* 1812, inclusive, and even those granted since by other authorities, full evidence could be found in this intendency [Havana] *if* the commandant and subdelegate of Pensacola, Col. Don José Masot, *had executed the orders* of the aforesaid superintendent-general subdelegate," &c., which orders were repeated "a second time, that the archives of *that* intendency [West Florida] and in particular that of the tribunal of lands," &c., "should be remitted and removed here" [to Havana]; "he (Masot) could not oppose himself to my removal, because," &c.; "but he did so to the removal of the papers of the tribunal of lands, and he compelled" the provisory secretary, who had boxed them up for removal, "to open those which contained the tribunal of lands and leave them"; so that they remained in Florida, as Pintado goes on to relate, until General Jackson took possession of that province in May, 1818, when Masot embarked with them for Havana, but upon the way the vessel "was visited by a corsair, calling himself insurgent, who took one box of the said papers, as is reported, and threw the rest overboard." (2 White's Recopilacion, 341.)

Thus it appears that it was customary to keep the register of the tribunal of lands in the archives of the respective provinces; and that it would only have been the records of West Florida, and of that province from 1799 to 1812, that would have been found at Havana had Masot obeyed orders.

The reason for this disposition of those particular records was that they contained memoranda of the *sales* of land by the intendant, and were, therefore, in some sort, a check upon his account. The *governors* never

sold land; they conceded it for services or for colonization purposes. When Morales became intendant he first sold the land for the benefit of the royal treasury under decree of October 22, 1798. (See Morales's regulations, 2 White's Rep., 234, top, and 244, last half of page.)

I will refer to one or two other circumstances as showing that Havana is not the place to look for the record of this grant. Maj. Amos Stoddard was designated to accept for the United States the delivery of the possession of Louisiana. In 1812 he published "Sketches, Historical and Critical," of that country. His preface to that work commences thus: "It fell to my lot, in the month of March, 1804, to take possession of Upper Louisiana under the treaty of cession. The high civil trust confided to me in that country drew my attention, in the first instance, to the jurisprudence, in the second to the principles of the French and Spanish colonial governments, and in the third to the civil history and geography of those regions. The records and other public documents were open to my inspection; and, as it was my fortune to be stationed for about five years on various parts of the Lower Mississippi, and nearly six months on Red River, my enquiries gradually extended to Louisiana in general."

At the bottom of page 258 the same writer says: "During the time the author of these sketches was first civil commandant of Upper Louisiana, *the Spanish records were in his possession;* and on them the preceding statement is founded." (Stoddard's Sketches, 258, bottom.) In the preceding paragraph he had said that the surveyor, after making the figurative plan of the survey, delivered it, *with the petition*, to the petitioner.

In the case of Lavergne's heirs *v.* Elkins's heirs, the supreme court of Louisiana say: "We have had produced before us the original record of *complete* grants made by the Spanish governors, *in charge of the proper officer of the United States, who, by law, is the keeper of that description of the archives*, obtained from the former sovereigns of the country." (17 La. (old series), 227, near the top of the page; see also page 231.)

I am not to be understood as asserting that the production of the originals is always and indispensably necessary to the establishment of a title. *Duly*-certified copies may be received where the absence of the original is properly accounted for. If the originals have been presented and proved before any of the boards created by the several statutes that have been passed upon the subject of Louisiana land titles, copies from the records of such board may be received, under the express declaration of Congress. (United States *v.* Watkins, to appear in 97 U. S. Reports.) But in such case the existence and genuineness of the original has been ascertained, and it has passed into the custody of government officers.

The cases cited at top of page 34 of counsel's brief are far from authorizing any recognition of the papers here offered. In the two first cited (from 16 Peters, 143, and 1 Howard, 24) the lands claimed were in Florida, and, at that date, the court say the proper depositary was with the archives at Saint Augustine; and, failing to find them there, a copy certified by the secretary, *whose signature was proved*, was admitted. So, in the case from 15 Howard, 1, the destruction of the original protocol and signature of the copy was proved.

The consular certificate, to which counsel appear (page

33, near bottom) to attach some importance as authenticating the document, simply says that the signers are notaries, and he thinks their official acts are to be regarded. That it is any part of the *official* duty of a notary anywhere to certify to the genuineness of the signatures to whatever papers he may happen to see signed, I do not understand.

The deposition of Creed Taylor (Record, 24 to 27) is of so little importance, and has such slight bearing upon the case, that consideration of it may be dismissed with the remark that a demurrer to a petition admits nothing as to evidence.

III.

The demurrer does not admit facts stated which are *repugnant* to one another. (1 Daniel's Ch. Prac., 545, chap. xiv, § 1; Loker *v.* Rolle, 3 Vesey, 4, 7.)

"Where two inconsistent statements are made in a bill, the defendant is entitled, upon demurrer, to adopt that which is most against the plaintiff's interest." (Mitford's Eq. Pl. (Am. ed., Phila., A. D. 1849), page 128, note 1, middle paragraph; Vernon *v.* Vernon, 2 Mylne & Craig, 145, 168.)

The second amended petition, art. IV (Record, 30), recites what is there called a "survey." As there recited, the English version is obviously defective, and fails so to describe any tract that it could be identified. By looking at the Spanish it will be seen that there is omitted a passage coming in between the words "Rio Blanco" and "Rio Cibolos," in the fifth line of the document, to this effect: "Bounded to the east, or on the lower line,

by the river Norte Grande, the White River, and the" River Cibolos. (See Clims'. Brief, 14, bottom.)

It is declared in the grant (page 31, folio 40) that it was "impossible to make an actual survey." The petitioners' counsel admit there was no actual survey. (Brief, 16, middle.) Had there been one, the great blunders, as to the source of the White River, &c., could not have happened. In his "Views of Louisiana" (printed at Pittsburgh, A. D. 1814), Brackenridge says, on page 5, middle: "The sources of the Mississippi, Missouri, Arkansas, Red River, Washita, and of White River are known to the world for the first time."

Upon pp. 100 and 101 this author gives a short description of White River, commencing with the observation that "this fine river was little known until lately"; and upon the next page he says: "The country watered by this river has only been traversed by Indians and hunters, and may be considered as still unexplored; it is spoken of with rapture by those who have seen it," &c.

There is just reason, then, for the acceptance of the statement by counsel that there was no actual survey by Trudeau; yet the document, called a survey, purports to have been actually made upon the face of the earth. Whoever wrote and signed it, whether Trudeau or some one who wrongfully used his name, commenced with the statement that the measurement of the tract designated was "in favor and in PRESENCE of Don José Valliere." He certifies that there has been "measured *and bounded* ['y lindado'—not translated in the record] in favor," &c. It is absurd to say that this expression means that he made the plat in Valliere's presence "from existing maps of the country and Trudeau's general knowledge," &c. (Clmts.' Brief, 16.) Brackenridge, as

just noticed, says the river and country were "still unexplored" in 1814; so the "existing maps" in 1793 could hardly afford the basis of a survey in the presence of the grantee.

But there is another expression in the Spanish version that is singularly enough *omitted* from each of the English translations in this record which are any part of the bill. The Spanish is: "En el qual estan señaladas las dimenciones y curso de los limites las *arboles* y *mojones*, sirviendo de linderas artificiales *y* naturales, las lineas y limites." (Record, pp. 8, 20, 36, where the document is so printed in each instance.)

The translations upon pp. 4, 15 (last line), and 30, all omit this significant passage. It should be inserted in the sentence which now reads: "All of which is *now* fully demonstrated in the figurative plan which precedes, in which is artificial *or* natural boundaries." Correctly rendered, it should read; "All of which is *more* [mas] fully shown in the foregoing figurative plan, in which *are marked the dimensions and course of the boundaries, the* TREES *and* POSTS, *serving as* natural AND artificial boundaries, the lines, and limits." Evidently, however, these last words, "the lines and limits," should commence the following sentence, which says they have been made (or completed) at the request of the grantee. This paper is translated, in this part of it, substantially as I have given it, in Valliere *v.* United States (1 Hempstead, 336, middle); though that translation is not precisely accurate as to some other phraseology of the document. The Spanish words "arboles y mojones"—meaning "*trees* and *posts*"—are not translated in any version found in the present record which is made part of the bill and affected by the demurrer. I do not find that "mas"

ever means "now"; it is "*more.*" It refers the party interested to the plat of the survey for the *more* certain identification of the lands granted, where the boundaries, established by spotted trees and posts set in the ground, would be found clearly indicated. Together they form natural *and* artificial boundaries; "y" being, almost invariably, a copulative instead of a disjunctive conjunction. And it asserts, in the outset, that it was thus "measured and *bounded*" in the *presence* of Valliere; and the plat (Exhibit B) is *dated at Arkansas Post.*

Is it not spotting too far over the line of human credulity for counsel to ask us to believe that a survey couched in these terms did not purport to have been actually made, but was only marked off "from existing maps and Trudeau's general knowledge," &c? If it assumes to be an actual survey when it is not, it is a *fraud*—though I do not believe it was the fraud of Carlos Trudeau.

Having referred to the translation in 1 Hempstead, 335, 336, I will call attention to a singular circumstance connected with it. It will be noticed that the words "y lindado"—"*and bounded*"—at the beginning of the document are not rendered, and also, in the fifth line from the bottom of page 335, that the words "Rio Blanco, Rio Cibolos" come together, precisely as they do in this record (pp. 3, bottom; 15, near middle; and 30, middle), omitting what is expressed by the Spanish which I have above translated (*ante*, p. 47, bottom) "bounded to the east, or on the lower line," &c.

That just the same omissions should happen there and here is curious. If it is accounted for by saying that the language in Hempstead was adopted, as pre-

sumptively correct, how does it happen that its phraseology was not followed, near the middle of page 336, where it speaks of trees and posts, &c.?

I have above spoken of the translations which were part of the original and amended bills or attached as exhibits thereto. Upon page 42 of the record is a translation more approximately correct. This, however, was not part of the bill. There is no minute of the date of filing it. It translates "mojones" as "monuments," which is, perhaps more accurate than "posts." Neuman says it is a heap of stones piled up to mark a boundary.

The Spanish in this record is miserably printed. Compare the text of the same document (Exhibit B) on page 35 with that on page 41.

IV.

GRANT VOID FOR UNCERTAINTY.

These papers, purporting to be a survey and a grant, are not only at variance with each other, but with the geography of the country, as shown by the map annexed as Exhibit G, compared with the plat of survey, Exhibit B. This is evident from inspection, and is conceded by the claimants' counsel. (Brief, 15, 16, 17 to 19.)

The court will also judicially notice the geography of the country (Peroux *v.* Howard, 7 Peters, 342, bottom; The Apollon, 9 Wheat, 374; State *v.* Wagner, 61 Maine, 185, 186, citing 1 Greenl. on Ev., § 6), and that the survey and grant recited cannot be applied with topographical accuracy to the existing state of things.

It is not contended that a survey is necessarily a condition precedent to the validity of a Spanish grant;

but it is asserted that when a survey purports to have been made, and the bounds established by marked, spotted, or designated trees, and by hubs or posts set into the ground, or monuments erected upon it for that purpose, and the plat of such running is especially referred to in the survey and in the grant to determine the location thereof, such plan and alleged previous survey cannot be wholly disregarded and rejected because not consistent with the other papers.

What is requisite is that there shall be such a degree of identity as, applying the text of the grant to the face of the earth, will enable the court to perceive, with reasonable certainty where the lands lie. (United States *v.* Lawton, 5 Howard, 29, at close of opinion.)

"The instruments themselves contain no lines or boundaries whereby any definite and specific parcel of land was severed from the public domain; and it has been settled, by repeated decisions in this court, and in cases, too, where the instrument contained clear words of grant, that if the description was vague and indefinite, as in the case before us, and there was no official survey to give it a certain location, it could create no right of private property in any particular parcel of land which could be maintained in a court of justice." (United States *v.* King, 3 Howard, 786, 787, citing earlier cases; United States *v.* Acosta, 1 Howard, 27.)

An official survey which gave no "certain location" would leave the matter precisely as if there had been no survey, except that, if the grant was confined to the tract delineated upon the plat of the survey, and that was too vague and erroneous to describe any territory on the face of the earth, then the grant must fail, and could be aided by no second survey.

In the above-mentioned case of United States *v.* King (3 Howard, 773), a plat and survey purporting to be made and signed by Trudeau was declared antedated and fraudulent, and, without it, the alleged grant was so vague and indefinite as to be rejected, as insufficient to sever any parcel from the public domain.

In United States *v.* Forbes (15 Peters, 173), the head-note states that the court could not confirm a title where the land could not "be severed from the public domain by a survey *pursuant to calls in the grant*," &c.; and that claim was "pronounced void for want of identity." (*Id.*, 184; Smith *v.* United States, 10 Peters, 326; Wherry *v.* United States, *Id.*, 338; United States *v.* D'Auterive, 15 Howard, 14.)

The concession, as translated in the petition (Record, 31) in the present case, is of "a portion of land in the jurisdiction of Arkansas, situated on both banks of the Rio Blanco, ten leagues on *both* banks, beginning at the origin of the most western branch of the Rio Blanco, and running southwest ten leagues, descending from thence on the south by parallel line with the Rio Blanco, at the distance of ten leagues, until it intersects Rio Cibolos at a point ten leagues in a direct line from Rio Blanco; from thence descending Rio Cibolos to its confluence with Rio Blanco. Following this as far as the mouth of Rio Norte Grande, up the same to a point ten leagues in a direct line from its mouth; from thence, ascending Rio Blanco to the north, in a westerly direction, ten leagues from the same, as far as its source, which will be better seen by the figurative plan made by my order by the Surveyor-General."

Having recourse to the map, Exhibit G, we may, for the purposes of this argument, accept that as indicat-

ing the course, &c., of White River, of its Great North Fork, and of Buffalo River; not assenting, however, to the correctness of the initial point designated by the petitioners upon this map.

The "West Fork of White River," as named on this map, being "the most western branch of the Rio Blanco," has its origin in Washington County, Arkansas, in several small streams in townships 13 and 14, ranges 29 and 30. Though the grant they produce starts "at the origin of the *most western* branch of the Rio Blanco," the petitioners, for some reason, prefer to indicate as the initial point, the source of the main river instead of the branch, in township 13, range 25, in Madison County, Arkansas. It will be perceived that the general course of the White River (main fork) is westerly, northwest, northerly, northeasterly, and southeasterly, but *never southerly* until after its junction with the Big North Fork, in Eastern Arkansas, whence it runs 600 miles to Arkansas Post, where it empties into the Mississippi. Its "most western branch" (the West Fork) tending but slightly toward the west, runs northerly, and then northeasterly to its junction with the main river. If we begin at the source of either fork and run southwest ten leagues we shall cross the Arkansas River, a navigable stream; a thing unknown in grants of this kind, and contrary to the well-known rule of Spanish surveys, to make navigable rivers boundary lines. It would be impossible to run southwest ten leagues and preserve that distance from Rio Blanco; nor, "descending from thence on the south," will it be possible to run "by parallel line with White River," nor to remain "at the distance of ten leagues," for it runs northerly and westerly. The act of 1860, § 11 (12 Stats., 87, bottom and *ante* p. 31), says the sep-

aration from the mass of the public domain, if not made by actual survey, must be by definition of "*fixed* natural and ascertainable boundaries or initial points, courses, and distances, by the competent authority." This statute requires the courses and distances given to be considered as "*fixed*"; but if this is made subordinate to the rule that monuments control course and distance, we must go westerly (instead of south), recross the Arkansas, follow the flow of the White River north and northeasterly, at a distance of ten leagues therefrom, until the line intersects Buffalo River, at a point ten leagues in a direct line from White River. Following the red line the plaintiffs have delineated upon the map as the westerly and northerly boundary of their claim, it will be perceived that such a line as the grant calls for (if we disregard course and distance) never could intersect the Buffalo River at any point, but extends indefinitely down the White River, across the Great North Fork, one of the boundary lines of the grant, to the junction of the White with the Mississippi, or ten leagues beyond. Whether the claimants have taken the true initial point or not, this line must fail, because it has a beginning (though uncertain) but *no end*. (See Wilson *v.* Indoes, 6 Gill, 154, quoted *infra*.)

For ten leagues the Buffalo River is made a boundary of the grant; but the line which is to intersect it ten leagues from its junction with the White River, never can strike it (there or anywhere else), or come any nearer to it than ten leagues from the mouth of the Great North Fork; therefore this boundary line must also fail, because, though it has a termination at the confluence of the White and Buffalo Rivers, it has no beginning.

Look at the next direction! "Following White River

to the mouth of the Great North Fork, up the same to a point ten leagues distant, in a direct line from its mouth," brings us to the northern boundary of the tract; if from thence, as directed by the grant, we ascend the White River, first northerly and westerly (as by their translation of the grant), and then southerly and easterly to its source (though no such course is given), we have the same boundary that we followed in descending, and we have the tract with no southern boundary at all, and with no closing or determinate lines. (Wilson *v.* Indoes, 6 Gill, 154.)

Reference to what purports to be Trudeau's survey (Exhibit B) shows that the courses given in the grant are those the grantor intended should be followed. Suppose this intention was based upon an erroneous idea of the geography of the country; but for this error no such grant would have been made. Nothing but a vague, indeterminate, unascertainable description could result from vague, indefinite, confused notions of the topography of the region; and it is not the duty of the court to originate a grant such as Carondelet might (or might not) have made, had he possessed your information. It is far from being a fair supposition to assume that he would have granted ten leagues each side of White River had he accurately known its course and the long distance from its source to its junction with the Great North Fork and Buffalo Rivers. This uncertainty and insufficiency of description, so obviously irremediable, must be fatal to the alleged grant. The land claimed by these petitioners was never vested in Valliere "by separation thereof from the mass of the public domain, either by *actual* survey or definition of fixed natural and ascertainable boundaries or initial points, courses, and distances,

by the competent authority prior to the cession to the United States." (12 Stats., 87, 88; *ante* p. 31.)

The grant was made (if made at all, and not the clumsy forgery of one ignorant of the features of that country) from a fanciful plan of the supposed configuration of the country, totally at variance with the truth, with no "*actual*" official survey to give it location, and so it created no private right of property in any particular tract of land which could be maintained in a court of justice. It is absolutely void. (See cases cited *ante;* United States *v.* King, 3 Howard, 787; United States *v.* Arredondo, 13 Peters, 88, bottom; United States *v.* Delespine, 15 Peters, 319; United States *v.* Forbes, 15 Peters, 84; Buyck *v.* United States, 15 Peters, 221; United States v. Mirandi, 16 Peters, 229.)

"A deed or patent for a tract of land passes nothing unless the land described therein is susceptible of location, or in other words, *unless the survey thereof can be made to close.* And it is perfectly immaterial whether the impediment to location arise from an inability to ascertain the beginning of the first line of the land granted *or the end thereof*, or the *beginning* or *end* of any other of its lines. In either case no title to the land is transferred under the deed or patent, unless it be in the rare case of the lines of a tract of land crossing each other or coming in contact, so as entirely to inclose a separate part of the tract before the occurrence of the insurmountable obstacle to the inclosure of the entirety.

"If a tract of land be granted by boundaries only, with out courses and distances, as beginning at A and running thence a straight line to B, thence to C, thence to D, and so on to the beginning, and the beginning or any subsequent boundary be lost, and its original sites be insusceptible of establishment by proof, the entire tract of land is lost, and the grant thereby becomes inoperative and void. So if a tract of land be granted by courses

and distances only, without calling for any boundary or object save that described as standing at the commencement of its first line, and that boundary or object be lost, and no legitimate proof can be adduced of the beginning or ending of any of its lines, the tract of land thenceforth becomes a nonentity; the grant for its conveyance a nullity." (Wilson *v.* Indoes, 6 Gill., 154, 155.)

That court goes on to say that, if courses and distances are given and also objects at the end of some of its lines, it will be possible, by establishing one object and then applying course and distance to fix the grant; but this evidently cannot be done unless it is possible to draw the line as directed from the starting point to the object named as the terminus of that line.

"To give a deed any sensible operation, it must describe the subject-matter of the conveyance, so as to denote upon the instrument what it is in particular, or by a reference to something else which will render it certain. The want of such a description or reference in this deed is a defect which renders it totally inoperative." (Kea *v.* Robeson, 5 Iredell's Eq., 378, bottom; Bailey *v.* White, 41 N. H., 337.)

If the court felt at liberty to do as the claimants have done, pay no attention to the discrepancy between the survey and the concession, reject the plain calls of the grant, disregard all courses and distances, the grant then might possibly be located somewhere on the White River, butting upon the Great North Fork and the Buffalo. This would be making an entirely new grant, a power this court declines to arrogate to itself. (United States *v.* Levy, 13 Peters, 81; United States *v.* Boisdore's heirs, 11 Howard, 93; Lecompte *v.* United States, *Id.*, 115; De Vilemont *v.* United States, 13 Howard, 267.)

This could only be done by totally rejecting the report of survey and grant, and relying altogether upon what

is called "the order of survey"(Record, 30, top)—a document conveying no title under any law, Spanish or American, and no right unless followed by possession or a subsequent survey. If the grant be rejected for uncertainty, then the order of survey accompanied by possession would constitute but an *incomplete* title—an equitable right to have a survey made—which by the earlier statutes should have been presented to the commissioners, and over which, under this act of June 22, 1860, neither this court nor the district court has jurisdiction, but it is wholly barred.

V.

PETITION DOES NOT COMPLY WITH STATUTE.

The eleventh section of the act of June 22, 1860, says the petition to be filed in the district court by claimants shall "conform to the provisions of section one and to the practice of such court in chancery." (See *ante*, p. 32, top.)

I. The first section of the act (*ante*, p. 27) requires, first:

"A brief abstract of the title of the claimant."

Some of the former statutes use the words "deraignment of title" or other equivalent expressions. (*Ante*, pp. 7, 17.)

"Abstract of title" is a familiar phrase, not only to lawyers, but among business men. Counsel filing a petition could readily understand what was required. Bouvier, in his Law Dictionary, gives the shortest definition, *i. e.*, "A brief account of *all* the deeds upon which the title to an estate rests." Burrill, in the course of a longer definition, says it is "arranged usually in chronological order, and intended to show the origin, course, and incidents of the title." In Wharton and Brown's Law Dictionaries it is said to be "an epitome of the evidence of ownership"; and each author proceeds to state what it

should contain, &c. Everybody understands that it should be a deraignment of title from some admitted original proprietor. The language was used as it would be if an intended purchaser asked of his vendor an abstract of his title. An answer that he claimed an interest from John Smith would give neither information nor satisfaction. Spain was the admitted original proprietor of these lands. The question is whether, by the French cession, the ownership passed to the United States or whether it had before vested in Valliere, and now rightfully should belong to the representatives of his title, and whether these claimants are such representatives.

As the court say, in Arredondo's case, per Baldwin, J., the United States "require us to finally decide between them and the claimants as grantees of the same grantor, which grant carries title to the land." But before they will submit that issue they require a deduction of the title by which the claimants assert the adverse right. As in all real actions, the question is "which party has the better title *in himself*." (Wyman *v.* Brown, 50 Maine, 144.)

The demandants must recover, if at all, upon the strength of their own title and not upon the weakness of the tenant's. If they deduce no title to themselves, the defendant's possession prevails.

The petition must also be according to the practice in chancery.

In ordinary equity proceedings it would be required that the complainants should state and show the nature of their interest and its derivation. If they claimed as heirs, it would be expected that they would indicate the course of descent and aver themselves to be *sole* heirs.

In cases like the present, the claimants, if successful, become entitled to a patent for all the land called for by the grant and unsold at the date of confirmation, and to

the right to enter upon any public lands of the United States a quantity equal in extent to that sold by the government according to the legal divisions and subdivisions established by the public surveys. The successful claimant gets either the precise tract demanded or its equivalent in other lands. It becomes, therefore, a matter of great importance that this surrender or recompense should be made only to persons fairly entitled. It is of no consequence whether Don José Valliere ever had a grant made to him or not, unless Benjamin Scull and the other parties claimant now legally represent his interest. The true owner can only be secured, and the United States protected by the statement and establishment in the petition of the derivative title from the original grantee. The court must necessarily pass upon the derivative title, as well as the original grant, and the confirmation inures to the claimants. (Bissell *v.* Penrose, 8 Howard, 317; United States *v.* Lynde, 11 Wall., 634; Connoyer *v.* Schæffer, 22 Wall., 261.) The law is summed up in this last case. If there be no deduction of title, the confirmation, in the name of the original grantee, inures to the benefit of whoever holds the legal title: if there be a statement of title, deducing it to the petitioner, the judgment, if favorable to the claim, establishes also the validity of his derivative title. In the present case, the statute requires an abstract of title; one derived from Valliere is set up; it is incumbent upon the claimants, then, to show how and to what extent they have obtained this title. It is made by statute an issuable fact, to be specifically alleged by them.

By the title to the original petition (Record, 1, 2), it would seem that only the seventeen there first mentioned as petitioners claim to be heirs of Don José Valliere,

and the other ten to have derived title, if any they have, through some unnamed mesne conveyances. Article XI of the last amended bill (Record, 33) contains the only statement professing to connect these petitioners with the original grantee, except the *entitling* of the bill. It says, "That your petitioners are lawful descendants and surviving heirs of said Don José Valliere and grantees of the heirs of said Valliere, and *as such* are the true and lawful owners in fee of said land, and have a just and equitable claim thereto, their interests in said lands being undivided and as tenants in common." (Record 33, art. XI.)

A demurrer does not admit a statement of legal conclusions or inferences of law; "it only admits *facts* well pleaded." (Dillon *v.* Barnard, 21 Wall., 437, bottom; Lea *v.* Robeson, 12 Gray, 280; Bryan *v.* Spruill, 4 Jones Eq. (No. Car.), 27; Dike *v.* Green, 4 R. I., 285; Story Eq. Pl., § 452; 1 Daniel's Ch. Prac., 545.)

Whether one person is or is not the "heir" of another is a question of law upon the facts and degree of consanguinity to be stated. Whether or not one is grantee under a deed, must be determined by the court upon an inspection or statement of the title-papers. Whether one is lawfully the grantee of an heir is, then, doubly a question of law upon facts to be shown. (Large *v.* Orvis, 20 Wis., 699, bottom; Lawrence *v.* Wright, 2 Duer, 673; Public Admr. *v.* Watts, 1 Paige Ch., 382, bottom; State *v.* Delong, 12 Iowa, 455, bottom; Ernull *v.* Whitford, 3 Jones, Law, 476, bottom; and especially Bradford *v.* Erwin, 12 Iredell, Law, 292.)

With particular force does this apply to a case in which the statute requires the filing of an abstract of title. The court states the fact of a correct deduction

as an essential requisite in Glenn *v.* United States (13 Howard, 255, top); United States *v.* Fossat (20 Howard, 425, near bottom). Indeed, independently of this requirement, the petitioners could only have a decree in favor of the validity of the grant to inure to their benefit by first showing their connection with the original grantee. "A decree in this form is often made against the government in these land cases, when a title is satisfactorily established, *and the parties prosecuting it connect themselves in some way with it, so as to show some real interest to be protected.*" McMicken *v.* United States (to appear in 97 U. S. Reps.), citing Castro *v.* Hendricks (23 Howard, 442), where it is said the mesne conveyances were required "to enable the board to determine if there was a *bona-fide* claimant before it under a Mexican grant"; and Brown *v.* Brackett (21 Wall., 388), to the same effect, and adding: "But a mere stranger to the title can hardly ask the court to go that length. It is not for every one who chooses to take up the prosecution of such claims, without any connection whatever with the title sought to be established." (97 U. S., —.)

It is further respectfully submitted that the phraseology of the act of June 22, 1860, requiring the abstract of title, is sufficient, irrespective of decisions founded upon different statutes and language.

The deposition of Creed Taylor is not part of the bill or pleadings, and is in no sense "an abstract of title."

From this deposition it appears there were other heirs. From the petition it does not appear whether all the heirs are party or not. Nor can it be said, from either paper, how the other petitioners became interested. The petition or abstract should set forth specially the extent of the interest claimed by each petitioner, and how de-

rived, so that the court could ascertain the validity and extent of the derivative title, and decree accordingly, if the grant were sustained. Mr. Duryea is understood to claim as grantee of the heirs, but whether of all or only a part, whether of those named or of those not made party, does not appear. In the title of the bill (as last amended, Record, 29) all the other petitioners are styled "heirs of Don José Valliere," and he is last mentioned as "grantee of *said* heirs." If this be true, they must have parted with their rights under this grant, have no further interest in it, and are improper parties to the bill. They have nothing upon which this court can adjudicate, as Duryea is then the party representing the interest they had, and the confirmation of the grant would inure to his benefit alone. If he claims to represent other heirs, through deed from John Wilson (Record, 6, top) or otherwise, the character of his title should be stated. This is required by statute, and as the "United States are not suable of common right, the party who institutes such a suit must bring his case within the authority of the act of Congress, or the court cannot exercise jurisdiction." (United States *v.* Clarke, 8 Peters, 444; Haycraft *v.* United States, 22 Wall., 92 and 98, at close of opinion.)

As already observed, the same thing would be required of the petitioners by the ordinary rules of chancery practice. (1 Story Eq. Jur., §§ 241, 251; Story Eq. Pl., § 509; Palmer *v.* Davis, 28 N. Y., 242.)

It must be *alleged* as well as proved; therefore, again, the deposition of Creed Taylor does not answer this purpose. This court can no more consider what is proved but not alleged than what is alleged but not proven. Dan'l Ch. Prac. (3d Am. ed.), 365; Foster *v.* Goddard,

1 Black, 518; Harrison *v.* Nixon, 9 Peters, 503, where Marshall, C. J., says: "Every bill must contain in itself sufficient matter of fact *per se* to maintain the case of the plaintiff," &c. (Rome Exchange Bank *v.* Eames, 1 Keyes, 188.)

The nature and derivation of their own title, and its connection with that of Valliere, if any he had, are peculiarly within the knowledge of the petitioners. (1 Dan'l Ch. Prac. (3d Am. ed.), 365; McIntyre *v.* Union College, 6 Paige Ch., 239; Darthey *v.* Clements, 6 Beavan, 165.)

II. The second requirement of the statute is "a sworn statement *by the claimant* of the lands supposed to be covered by his claim, according to the legal divisions and subdivisions of the surveys made by the United States, if the land claimed is included in the surveys so made." (12 Stats., 86, top; *ante*, p. 27, near bottom.)

Article VIII of the bill (Record, 32) alleges that the lands are included in such surveys, but gives the purport of a correspondence with the land commissioner, and his opinion that a survey is unnecessary, as a reason for not complying with the statute in this respect. Article XVI (Record, 34) says that the claim, "according to the legal divisions and subdivisions of the surveys made by the United States," is for a strip 37½ miles in depth on both sides and banks of the White River, "commencing at the extreme westerly source of the same," and extending to where the Great North Fork and the Buffalo River are intersected by the White River, and embracing all townships, sections, &c., within those limits, and referring to a statement by a Mr. Day, and a government map, marked by Mr. Day.

This is no compliance with the statute. It is merely equivalent to saying that there is included within our claim whatever townships and sections are embraced within its limits. The grant is from the source of the most westerly branch of White River; as already noticed, this is the "West Fork"; which, however, is *not* adopted as the basis of this statement.

This statement is not the claimant's, but is by Mr. Day, as an *ex-parte* affidavit, made and filed long after the filing of the bill, and after the expiration of the time when the statute permitted a bill to be filed. It is his computation upon a map which only enables him "to *approximately* calculate the contents of the land embraced within the grant" (Record, 38, near middle). Upon the next page (39) it is said that the course of White River is only "indicated *approximately*" by the diagrams filed as exhibits, and made the basis of Mr. Day's computation, and that different data would have to be resorted to to show "the *actual* extent of this grant."

What the statute required was such an indication of divisions and *sub*divisions of the government survey that are covered by the claim, so that the same may be withdrawn from sale and entry, as provided in section 8. (12 Stats, 87; *ante*, p. 30.) For such designation as the law contemplated, see the below-mentioned case, United States *v.* Marquis of Casa Yrujo, No. 799 of present term, and the plan with a double aspect filed therein.

The exhibits upon which Mr. Day figured contain only *township* lines; none of the "*sub*divisions" are represented.

The "final grant" (which Mr. Day swears he followed) says, as to the northern boundary: "Following this [the White River] as far as the mouth of the Rio Norte

Grande, up the same to a point ten leagues in a direct line from its mouth; from thence, ascending Rio Blanco to the north in a westerly direction, ten leagues from the same," &c. (Record, 31).

There is no indication that the line is to be straight. It is always to be ten leagues from White River. At that point on the map (Ex. G.) where is shown the largest turn or "ox-bow" in the stream (near Forsyth, Mo.), it would make a difference of many "divisions and subdivisions according to the United States survey" whether the line is run straight, as Mr. Day has drawn it, or follows the sinuosities of the river. To run it straight because it is so on the pseudo Trudeau "plat" is absurd, unless the river is also made to run as there indicated.

Examining this affidavit and statement of George H. Day (Record, 39, 40), we find that he swears (near the bottom of Record, page 39) he has "made the plat or map hereto annexed, marked Exhibit G, *in conformity with the final grant*, of which Exhibit C, in said petition, is a copy, and the *process verbal* of the survey made by Trudeau, of which Exhibit B is a copy, and also in conformity with the diagram hereto annexed, marked Exhibit F."

Comparison of the calls of the final grant and of Trudeau's survey with the delineation of the petitioners' claim upon the map, Exhibit G, has been already made (*ante*, pp. 53 to 57). Trudeau (or somebody usurping his name and authority) made a plat supposed to conform to the requirements of the grant, or of the order of survey. If the court will again compare that plat, the language of the pretended survey, and that of "the final grant," with the red lines by which Mr. Day has marked on Exhibit G the boundaries of the petitioners' claim, it

will be seen how much reliance can be placed upon the skill of a surveyor, or the veracity ofa witness, who will swear that those red lines are drawn "in conformity with the final grant," and with "the *process verbal* of the survey"!! In what language of these documents does Mr. Day find authority for running his first line from the source of the main branch of the White River *due south* (Record, 40, middle), and his next line about west by north? ("*north* of west," record, 40, middle), and so on with the remaining lines? Compare these red lines with those upon the plat produced as Trudeau's, and say which (if either) are, in reality, drawn "in conformity with the final grant," and whether it is possible for them both to be so drawn. It is one more example of the nature and value of "expert" testimony. As a "survey," or as evidence, Mr. Day's drawing and affidavit are of no consequence (United States *v.* Hanson, 16 Peters, 201); it is only as a "statement" of the lands covered by the survey that attention is drawn to its unreliability and utter repugnancy to the very papers on which it purports to be founded. See what is said in plaintiff's brief, pp. 15, 16, and bottom of 17, to learn whether they think the red lines on Exhibit G are drawn in conformity with the final grant and the *procès verbal* of Trudeau.

The statement by Mr. Day does not comply with nor answer any of the purposes of the law, in requiring a statement of the land claimed by divisions, &c., which is to be transmitted to the Commissioner of the General Land Office. (12 Stats., 86, § 1, *ante*, p. 27, bottom.)

The object of this provision, and the necessity of a full compliance with it, is declared by the eighth section

of the act of June 22, 1860. No land claimed under the grant can be offered for sale or otherwise disposed of until the final decision shall be made on the validity of the claim; and the list of lands by legal divisions and subdivisions is required to enable the Commissioner to withdraw these lands from market. It will not do to state generally that the lands granted lie within certain boundaries more or less indefinite in character, as in this case, for the statute absolutely calls for a statement by legal division and subdivision, and for the further reason that such a general statement would either devolve upon the Commissioner the duty of designating these divisions when the law requires it of the claimants, or the officers of the government could not know what particular tracts are claimed under the grant, and therefore could not comply with the law regulating the lands to be withheld from sale or entry, and that provision of the law would be substantially abrogated. This case had been pending for over two years prior to the appeal. No such list has been furnished, and during this time the lands covered by the grant undisposed of at the time of the institution of the suit have been subject to sale or entry, and doubtless many thousand acres have thus been transferred from the United States to private owners. It may be that the claimants desire this diminution of their original patrimony to continue, and as they may reasonably expect, since it takes two years to get their petition free from demurrable defects, that in the years which must elapse before a final decree can be rendered, the whole or the larger portion of the lands will be disposed of, and they can exchange the flint hills of the Ozark range and the swamps and canebrakes of the White

River Valley for the fertile and swelling prairies of Kansas and Nebraska.

"It may be urged that, as the grant is so vast in extent, it is impossible for the claimants to comply with this provision.

"This is one of the misfortunes of the complainants; but whether it can dispense with a plain demand of the statute I leave the court to determine. By the act of May 26, 1824, there was a similar provision in relation to floating warrants for the lands contained in the claim, which had been disposed of by the United States, and that act required the names of all persons claiming the lands sued for, or any part of it, should be set forth in the petition and made parties defendant. It was decided in United States *vs.* Moore, 12 Howard, 223, and United States *vs.* Roselius, 15 Howard, 35, 36, that the claimant under the act must not only state in his petition the names of those who are adverse claimants, but also the lands granted by the United States within his claim, and if that is not done, no general decree for floating warrants could be made.

"III. There is a further objection to the petition which may be properly urged in this connection. That is, it is not alleged that the claim does not come within the purview of the third section of the act of June 22, 1860. The well-known rule is that when there are exceptions incorporated in the same clause or section of a statute or of a private instrument, the party relying on the general clause must in pleading state it with the exception. 1 Chitty's Pleading, § 224; 1 Bishop's Crim. Proc., § 385 (n. 5). And it makes no difference in the rule that the exception is not in express terms, but by reference to some subsequent or prior clause or to some other statute. Same authorities.

"Under the statute a petition will not lie if the claim comes within the purview of the third section of the act, and that it does not, should be so stated by the pleader.

"If the claim has been heretofore presented for confirmation before any board of commissioners or other public officer acting under authority of Congress, and rejected as fraudulent or procured or maintained by fraudulent or improper means, or has been twice rejected on its merits by previous boards, it cannot be considered by the court, nor can it be considered, if from defect of proof, suspicion of fraud, uncertainty of location, or vagueness of description, or from any other cause sufficient to justify its rejection. None of these disqualifying facts are negatived by the petition. It is a rule of real property that parties claiming under a grant or deed are presumed to know their own title, and they should be compelled to disclose all the facts and circumstances connected with it to enable the court to be informed if it be legal and *bona fide*, and subject to no defects, inherent or extraneous, to destroy its vitality.

"IV. It is next objected to the petition that it contains the names of new parties over whom this court can take no jurisdiction and whose rights, if any they may have had, are barred by the statute.

"The parties named in the third clause of the demurrer were not parties to either the original or first amended petition, but have been added to the second amended petition which was filed April 6, 1876. The act of June 10, 1872, extended the provisions of the act of June 22, 1860, for three years from and after the passage of the former act. (17 Stat. at L., § 1, p. 378.) This act would therefore expire June 10, 1875, and the court could entertain jurisdiction of no claim not presented or sued upon within that time.

"The rights of the claimants in this case are separate and distinct, they claiming as tenants in common, each for an undivided interest in and to the lands covered by the grant, and the presentation of the claim by one would not inure to the benefit of any of the other claimants, but to each will be confirmed that portion of the lands covered by the grant, to which, by the allegations

and proof, he may show himself entitled. This I think clear, and results from the legal incidents of tenancy in common. (1 Washburn on Real Prop., p. 438, 2d ed.) Each holds a title in severalty to an undivided part, and while all may have a collective interest in the confirmation of the original grant which is the common source of title, that interest extends only to the extent of the share owned. The court may find some of the petitioners to be entitled to a portion of the lands in the grant and that others are entitled to nothing at all, and these portions may be of very unequal extent.

"The claim of each one must stand or fall upon its particular merits, and as the claimants mentioned in the third clause of the demurrer failed to present their claim, or institute their suit during the life of the statute, they must abide the consequences. The court is closed for them and can afford them no relief. United States *vs.* Porche, 12 Howard, 432; United States *vs.* Patterson, 15 Howard, 13.

"The case of United States *vs.* Innerarity, 19 Wallace, 597, decided October term, 1873, is directly in point, Judge Hunt holding that such a course of making new parties indefinitely would be a practical abrogation of the statute, and citing United States *vs.* Patterson (*supra*) as decisive authority against the practice.

"V. The next objection urged to the form of the petition is that there is no allegation that the original claimant, or those holding title under him, have ever been in the possession of and cultivated the lands claimed or any part of them.

"It is true it is alleged that the lands have not been possessed or cultivated by the original claimant or those claiming title under him, for a period of twenty years prior to the filing of the petition, and that allegation is good as far as it goes. But is that sufficient? The statute, in regard to the requirement of possession and cultivation, is somewhat awkward in expression, and presents some difficulty in its construction. But we main-

tain that, from a careful reading and consideration of the provisions of the whole statute, the true intent and meaning of it is that possession and cultivation of the lands claimed or some part thereof, at some time prior to the twenty years before bringing suit, constitute the foundation upon which the claim for relief must be based. That where a grant has been made and completed during the time when the foreign government from which it emanated exercised sovereignty over the territory in which the lands granted are included, and during all the time which had elapsed from the date of the grant to the enactment of the statute of June 22, 1860, there had been no possession or cultivation of the land granted, or any portion of it, under the grant by the original claimant or his legal representatives; that in such case there must arise a strong, if not conclusive, presumption that the grant either had no original validity or had been abandoned. It was not to be presumed that parties who held extensive claims to large and valuable portions of the public domain, especially where such claims rested, as in this case, upon a complete and perfect title, and the land covered by them had been set apart by solemn grant, and designated by fixed natural and ascertainable boundaries, would sleep on their rights for three-quarters of a century and make no effort to possess and hold so rich an inheritance, particularly as the lands were vacant and unoccupied for many years after the title had become vested, so that possession could have been taken without opposition, and the courts always open to secure and protect them in their rights. It is well known that a complete Spanish grant for lands within the Louisiana Territory, made prior to the treaty of St. Ildefonso, has always been regarded as intrinsically valid as a perfect title, needing no sanction from the legislative authorities of this country to enable the holder to assert his rights under it either in law or in equity. (United States *vs.* Reynes, 9 Howard, 145.)

"An action of ejectment or a writ of right could have been maintained against an adverse possessor, and the statute of limitations would interpose a bar only after the

lapse of more than twenty years. To allow the holder of a title having all these means of asserting his rights, at his disposal, to be permitted to come in after the lapse of more than eighty years, and assert an old, stale claim under a Spanish paper dated in 1793, which never had been followed by possession on the part of the grantee, or his legal representatives, nor even surveyed or recorded, or in any manner recognized by the Spanish Government at the time of the cession of this territory to the United States, would be extending the liberality and equity of the statute to an extraordinary and an unwarranted length. We believe that the letter and spirit of the law are both against so startling a proposition. By section 3 of the act the commissioners are required to divide the claims presented and passed upon by them into three distinct classes. Number 1 shall contain all claims which ought to be confirmed, where the lands claimed under a written title have been possessed and cultivated for at least twenty years preceding the date of filing the claim. Number 2 shall contain all claims of the same kind where the lands have not been possessed and cultivated during the twenty years preceding the presentation of the claim. This class also ought to be confirmed; and number 3 shall contain all claims which for the reasons stated in the act ought to be rejected. In both of the classes reported for confirmation, possession and cultivation by the original claimant or his legal representatives for a longer or shorter period seem to be regarded as the essential condition for a favorable report. Of the first class there can be no doubt. It is expressly declared. In the second class there need not have been possession or cultivation for twenty years prior to the claim. But does that dispense with possession and cultivation altogether? If such had been the intention of Congress, different terms than those used would have been employed to express it. No actual possession and cultivation of the land claimed would be sufficient, and the law would have been so written. But the limitation of the time when no possession and cultivation shall have existed to twenty years, presupposes that there was, as

there should have been, actual seizin and possession before that time, and that it had ceased.

"This is in harmony with the whole act, and accords with the cardinal rule of construction of statutes, that effect is to be given, if possible, to every clause and section of it. Section 2 of the act of June 10, 1872, authorizes courts to confirm every claim where there has been continuous possession and cultivation of the land claimed since the date of the cession of the territory of the United States (17 Stats. at L., p. 378, § 2), affording legislative construction of the necessity and wholesome effect of possession in this class of claims. Now, section 11 of the act authorizing these suits to be brought in the court, where the lands have not been in possession or cultivation for the period of twenty years, "aforesaid," must refer to the third section of the act where that period only is mentioned, and if it be the true construction of that section (as we contend) that a claim could not be reported for confirmation by the commissioners where there had been no possession at all, it must follow that no suit upon such claims could be maintained where no possession had ever existed."

VI.

Under the Spanish law, such a grant as this purports to be was conditional upon some intimation of acceptance, and some sort of taking possession and settlement, compliance with which should be averred and shown.

Stoddard says: "*All* grants and concessions of lands included a number of conditions, either express or *implied*. In Upper Louisiana the proprietor was obliged to clear some land, and to build a house within a year and a day, or his claim was forfeited and liable to revert to the domain." (Stoddard's Sketches, &c., 246.)

This grant professes, in its introductory clause, to be "for the benefit of the public, and for the greater en-

couragement of the agriculture and industry of the country." (Record, 31, 36.)

How could a *public* benefit be derived, or agriculture and industry be encouraged, except by a development of the tract granted? Thus there was, at least, no waiver of the ordinary conditions implied as a part of every grant.

VII.

Applying, as directed by the statute, section 11, the rules of "equity and justice and the principles established by this act" (in its third section) to this case, it "ought to be rejected, whether from defect of proof, suspicion of fraud based on probable cause, uncertainty of location, vagueness of description," and other sufficient cause. (12 Stat., 86; *ante*, p. 29.)

1. "Defect of proof."

There is absolutely *no* proof of the authenticity of the alleged grant; no identification of signature; no production of originals; not even of copies from any proper or authorized depositary, and the bill shows that the petitioners have nothing better to offer in support of their claim, alleging as a reason a state of facts which never existed.

2. "Suspicion of fraud, based upon probable ground."

The size of the grant is of itself suspicious, especially as it contains no condition for settlement, cultivation, or development in any way, by erection of mills, establishment of colonies, posts, or otherwise, the *implied* condition of building a house thereon being inadequate. The statement of Judge Martin that twelve square leagues to Baron de Bastrop, for colonization purposes, was the largest known grant, has already been quoted.

Its purporting to be a *complete* grant by Carondelet to land in Upper Louisiana is noticeable. The commissioners to settle Missouri land claims under the act of 1832 say, in their report: "It is to be observed that the lieutenant-governor and the other subdelegates in Upper Louisiana have *almost universally* originated the claim or concession. The cases are few in which the original grant emanated from the governor-general, *and scarcely constitute exceptions to the general practice, since in those few cases the survey was to be made under the immediate sanction of the provincial authority.*" (5 Am. State Papers, 703.)

Upon the following page they say, "We find that *all* the *complete* grants, eighteen only of which have come to our knowledge, were based on grants made by the subordinate authorities." (*Id.*, 704.)

Stoddard says: "Titles derived immediately from the Crown, or those sanctioned by the superior authority at New Orleans, were deemed *complete.* But these formed a very small proportion of the whole. *Incomplete titles* were those derived from the naked concessions of the lieutenant-governor, or of the commandants, and unsanctioned by the highest representative of the Crown at the capital of the province. These formed *more* than nineteen-twentieths of the whole." (Stoddard's Sketches of Louisiana, 245.)

The production of alleged copies from the *State* land-office, instead of from the proper custody, is a suspicious circumstance.

So is the different phraseology of the pretended grant from that used in the (so-called) survey, especially as we are told by Stoddard that, "The terms of petitions and concessions were drawn with great exactness, and those

of the latter corresponded with those of the former." (Sketches, &c., 246.)

Both of the documents (grant and survey) are couched in terms which cannot be complied with, to inclose any land; therefore the attempt to fall back upon the vague generality of the so-called "order of survey," an instrument never held to be of any validity to give title without proof of a survey under the order and possession taken.

The confession that what purports to be an actual survey was not so in fact is a clear badge of fraud. That there was no survey is so plain, from the paper itself, as well as from extrinsic evidence, that it is admitted. But Trudeau would never have pretended to make an actual survey, when he made none; nor spoken of trees and monuments as marking the boundaries, when none were there to designate it. The court can look at his plan in United States *vs.* Baltimore and New Orleans, Nos. 186 and 187 of October term, 1873, found in vol. 7 of the transcripts of that term, ink paging 5584, where the different species of trees in the line are indicated, white oak, red oak, laurel, roble, pine, beech, &c., as well as ponds, streams, &c., that serve as monuments. See also the plan in No. 799 of the current term (submitted under Rule XX), United States *vs.* Marquis Casa Yrujo, page 33 of that record. When no actual survey was made, the surveyor so stated. 2 White's New Recop., 354, top. (Pintado was Trudeau's deputy.) (Menard *vs.* Massey, 8 Howard, 316.)

Another peculiarity strikes me. At the bottom of the Spanish version of the grant is found the memorandum "11 de Junio, 1793" (Record, 37, near top), which is the

date of the "order of survey." In no instance of any genuine grant have I seen any such reference to the date of the order of survey. It was not customary. It was done in this case to establish the connection, and give the greater air of probability, whereas it really has the opposite effect from that intended.

The long delay in presenting this claim, the obscurity in which it rested, unknown to any individual or official cognizant of these matters, is also an indication of fraud. It will hereafter be mentioned as laches and as presumptive evidence of abandonment; it is now referred to, with these other circumstances, as affording "suspicion of fraud, based on probable ground." It was presented to no recording officer, to no commissioner, no tribunal, nor was it brought in any way to the notice of the government until September, 1846, when a petition, afterwards dismissed for want of prosecution, was filed in the United States district court in Arkansas. (Record, 27, 38.) Vallière *vs.* United States, 1 Hempstead, 337, lower half, and 338.

Claimants' counsel argue, quite unnecessarily, that they were not *obliged* to file this claim before. (See their brief, pp. 21 to 27.) Certainly not; but they had the *privilege* of presenting it, if they would; and, by so doing, would have caused the territory claimed to be withdrawn from sale and entry as public land; instead of which, they choose to lie by and see it covered with a teeming population and all the improvements of civilization. On a complete grant, they could have maintained ejectment and shut out the settlers (United States *vs.* Reynes, 9 Howard, 145, cited *supra*), but they omitted to do it, because they were not under any legal *obligation*

to enforce these rights! True; neither is a man who hears himself accused of a crime recently committed *obliged* to deny the accusation, or to enter into any explanation of suspicious circumstances; nevertheless his failure to do so will be received and considered by those who may, in due course of law, be called upon to determine his case. That the claimants have slept on this matter is a *fact*, arousing "suspicion of fraud, based upon probable ground." That a claim of such magnitude "should be permitted to sleep more than half a century is a *strong* circumstance against its *validity*," says Johnson, J., in 1 Hempstead, 338, top. "Such laches is conclusive evidence of abandonment, *if not of their total want of genuineness*." (United States *vs.* Simon, 12 Howard, 435, top.) "It is impossible to deny but that the claim comes before us under circumstances of *very great suspicion;* or to resist the conclusion that the grant, *if made*, had been abandoned." (United States *vs.* Hughes, 13 Howard, 3, bottom; *Id.*, 6; United States *vs.* Moore, 12 Howard, 222, 223, quoted *infra*.)

The pressure of this fact compels a misstatement of the law. (See claimants' brief, 21, 22.) The statute there cited (act of March 26, 1804, § 14; *ante*, p. 5) only prohibits settlement and survey upon "lands *belonging to the United States*, within the limits of Louisiana." If the claimants were seeking to perfect an *incomplete* title—under their "order of survey," for instance—they could plead this statute as a reason for not surveying and taking possession; in that case, however, the claim would be barred, and this court have no jurisdiction; but, by a *complete* grant, which is a perfect title, upon which ejectment can be maintained, the land becomes private property. If the petitioners had such a grant

they could have freely entered upon *their own* land—not "belonging to the United States"—and surveyed and settled it, ejecting trespassers. It was *because* complete grants were such a title that they were not required to be presented before commissioners, &c. In Glenn's case, cited by the claimants, the claim was *incomplete*, and because the land had not been severed by any survey from the public domain, there was no specific land which could be said not to belong to the United States. In the present instance, the petitioners' silence permitted this tract to be mapped out into townships, &c., unchallenged.

Nor was there any trace of this claim upon any *proper* record. Had it been found there, it would have been the duty of the commissioners to have noticed it. 2 Public Land Laws and Instructions (compiled by Asbury Dickins, Secretary of the Senate), 744, middle.

The "uncertainty of location" and "vagueness of description" have already been sufficiently noticed.

VIII.

LACHES AND ABANDONMENT.

The delay, silence, and conduct of the claimants for eighty years, which have been cited as *presumptive* evidence of fraud and of the falsity of the claim, are now urged as *conclusive* evidence of abandonment and want of equity, according to all the principles recognized in courts of chancery, and as furnishing the "other sufficient cause" for the rejection of the claim mentioned in the third section of the act of June 22, 1860.

Inasmuch as the practical effect is the same, I decline to enter into any discussion whether it is more correct to say the claimants are barred of a right to relief in equity on account of laches, or that they must be held to have abandoned the grant.

"Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence and to decide accordingly." (Sullivan *vs.* Kennebec and Portland R. R. Co., 94 U. S., 811, bottom, citing many authorities; Roby *vs.* Cossitt, 78 Ill., 643, *et seq.*)

The petitioners have had their day in court. Over thirty years ago the claim was dismissed for want of prosecution, the learned judge observing: "But the fact that a claim of such magnitude, and thus apparently formal and regular as to muniments of title, should be allowed to sleep more than half a century, is a strong circumstance against its validity, and *on the familiar principle of lapse of time* ought to be almost *conclusive* against it." (Hempstead, 338.)

This was *res adjudicata*. There was no leave to bring another bill, nor was it dismissed without prejudice.

After another Rip-Van-Winkle nap, it waked up, just as the expiring hours of statutory time were running out, sufficiently to present itself in great dishabille before the court.

"After the United States assumed jurisdiction, boards of commissioners almost constantly existed, before which

this claim could have been presented, and through them reported to Congress for political action thereon; yet no step was taken, and the claim slept in the hands of Yriarte until 1835, when he sold it in Madrid; and it first made its appearance in this country when presented to the district court in June, 1846. * * * We are called in to decide in this case according to the rules governing a court of equity, and are *bound to give due weight to the lapse of time.* * * * No case has come within our experience where the obscurity and antiquity of the transaction more forcibly than in the present case required a court of equity to bar a complainant on legal presumptions founded on lapse of time, and where the bar should take the place of individual belief." (United States *vs.* Moore, 12 Howard, 222, 223.)

We expect the court to come to the same conclusion, and to give it similar expression, in the cause at the bar; except that it will be in concurrence with individual belief, instead of in place of it. United States *vs.* Simon, 12 Howard, 433; United States *vs.* Hughes, 13 Howard, 1 and 4 (two cases).

IX.

The petitioners demand a "final" judgment in their favor. Yet, if the court were otherwise inclined to give it them, how can it be known for what specific "divisions and subdivisions, according to the United States survey," such judgment ought to be rendered, and for what lands (that have been sold) scrip ought to issue. This is essential to be known to enter a correct judgment for a claimant in such a case; and he should give the necessary data, as is customary, as will be seen by refer-

ence to the before-mentioned cases of the current and former terms.

Not anticipating that the court will ever come to be confronted with this difficulty, I leave the point and the cause without further discussion, having already protracted it far beyond the necessities of the case, out of regard to the magnitude of the claim and the consequences dependent upon its result.

EDWIN B. SMITH,
Assistant Attorney-General.